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1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF NEW YORK

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3 DANIEL KLEEGERG, et al.,

4 Plaintiffs,

5 v.

16 Civ. 9517 (LAK)

6 WENDY EBER, et al.,

7 Defendants.

8 -----x

Trial

9 New York, N.Y.  
10 September 22, 2021  
9:30 a.m.

11 Before:

12 HON. LEWIS A. KAPLAN,

13 District Judge

14  
15 APPEARANCES

16 BROOK & ASSOCIATES, PLLC  
Attorneys for Plaintiffs

17 BY: BRIAN C. BROOK

18 FARRELL FRITZ, P.C.  
Attorneys for Defendants

19 BY: KEVIN P. MULRY  
FRANK T. SANTORO

20 -and-

21 HERBERT LAW  
Attorneys for Defendants

22 BY: JOHN HERBERT

23  
24 Also Present:

Ali L. Kral, Paralegal

25 Samantha Skoriak, Paralegal

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Gallagher - Direct

1 (Trial resumed)

2 THE COURT: Good morning, everyone.

3 COUNSEL: Good morning, your Honor.

4 THE COURT: I have turned my camera off because there  
5 isn't any particular reason for the witness to be distracted by  
6 looking at me.

7 Let's call your next witness, counsel.

8 MR. MULRY: Good morning, your Honor. The defendants  
9 call Michael Gallagher.

10 MICHAEL A. GALLAGHER,

11 called as a witness by the defendants,

12 having been duly sworn, testified as follows:

13 THE COURT: Let's proceed.

14 DIRECT EXAMINATION

15 BY MR. MULRY:

16 Q. Good morning, Mr. Gallagher.

17 A. Good morning.

18 Q. My name is Kevin Mulry. I represent the defendants in this  
19 case.

20 Did you work with me to prepare a declaration that  
21 constitutes your direct testimony in this case?

22 A. Yes, I did.

23 Q. I will ask that we show Defendants' Exhibit ZB, the  
24 declaration of Michael A. Gallagher.

25 Mr. Gallagher, can you see what's on the screen right

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Gallagher - Cross

1 now?

2 A. Yes, I can.

3 Q. Is that your declaration in this case, Defendant's Exhibit  
4 ZB?

5 A. Yes. Based on the first page, it looks like mine.

6 Q. Okay. And did you review that declaration carefully?

7 A. I did.

8 Q. And if we go to the last page which is on the screen now,  
9 did you sign that declaration under penalty of perjury?

10 A. Yes, I did.

11 Q. Do you reaffirm your direct testimony here today?

12 A. I do.

13 MR. MULRY: Your Honor, defendants offer the direct  
14 testimony of Michael A. Gallagher, which his declaration is  
15 Exhibit ZB.

16 MR. BROOK: Plaintiffs object on the grounds stated in  
17 the motion *in limine* filed to exclude the testimony.

18 THE COURT: I will receive it subject to that motion.  
19 It may or may not stay in the record.

20 (Defendant's Exhibit ZB received in evidence)

21 MR. MULRY: Thank you, Mr. Gallagher.

22 THE COURT: Cross-examination. You may proceed.

23 CROSS-EXAMINATION

24 BY MR. BROOK:

25 Q. Good morning, Mr. Gallagher. My name is Brian Brook, and I

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Gallagher - Cross

1 am the attorney representing Daniel Kleeberg, Lisa Stein, and  
2 Audrey Hays in this case. You and I have never spoken before,  
3 correct?

4 A. Correct.

5 Q. And you and I have never corresponded in any way before,  
6 correct?

7 A. Correct.

8 Q. And just since I don't know, do you know any of my clients,  
9 or do any of their names sound familiar to you?

10 A. You mean the ones -- no, not -- no, other than I believe I  
11 have seen their name in some of the papers.

12 Q. Now, when did you start working on the Eber Brothers  
13 pension plan?

14 A. That was in 2007.

15 Q. Okay. So it was right when -- is it correct that at the  
16 time Eber Brothers' business was going through some changes?  
17 Did you understand that?

18 A. Yeah, we were not privy to what was going on directly in  
19 the business. Our work was limited to calculating the minimum  
20 funding for the retirement plan. So the details of what was  
21 happening in the business we were not really aware of.

22 Q. And who did you primarily interact with at Eber Brothers  
23 about the pension funding?

24 A. So that would have been Mark Shevlin.

25 Q. So human resources manager?

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Gallagher - Cross

1 A. Yeah, he was either human resource or finance.

2 Q. And after Mark Shevlin left the company -- actually, do you  
3 recall approximately how long it was that you worked with Mark  
4 Shevlin after 2007?

5 A. I don't. I could look in the file, but . . .

6 Q. No need to do that.

7 Who was the person you interacted with after Mark  
8 Shevlin?

9 A. I believe that was Wendy Eber.

10 Q. And what was your understanding as to what her role was at  
11 Eber Brothers Wine & Liquor?

12 A. So, yeah, I knew she was the daughter of Lester, so there  
13 was some ownership involved, either directly or indirectly, and  
14 she was just also our contact for the calculations that we did  
15 on an annual basis.

16 Q. And based on your conversations with either Mr. Shevlin or  
17 Ms. Eber, was it your understanding that Eber Wine & Liquor  
18 intended to continue to pay the minimum amounts required under  
19 the plan if it could?

20 A. Yes, the minimum amount was the contribution that we  
21 calculated, and that was the intention as far as I understood  
22 of what they were going to pay annually.

23 Q. Did they ever tell you that they intended to close the  
24 business and terminate the plan?

25 A. Not during the normal process of the work that we did, but

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Gallagher - Cross

1 at one point when we found out that they were looking at  
2 terminating and going to the PBGC, so up until that point in  
3 time we didn't know anything about a termination.

4 Q. Approximately when was it that you heard about the event  
5 that you just described of going to the PBGC about a  
6 termination?

7 A. So it was -- I would say we did a waiver of funding in  
8 2009, and so it was a couple of years after that where they  
9 were unable to make the payment, and so they had to either  
10 apply for a distress termination with PBGC or work directly  
11 with them. I don't have the date right in front of me.

12 Q. Is it correct that you stopped working on the Eber Brothers  
13 pension plan in or around 2014?

14 A. Yes.

15 Q. And is it your understanding that at that point PBGC took  
16 over the administration of the plan?

17 A. We knew that they were working with PBGC. I don't know at  
18 that point if we were aware that they were going to take it  
19 over.

20 Q. Okay. Why did you stop working on the plan?

21 A. At the time they were not funding the plan, and they turned  
22 over the process of the termination to their -- a law firm. I  
23 believe it was Groom Law Firm, and so they took over basically  
24 the handling of the plan going forward.

25 Q. And do you recall how long was it that Eber Wine & Liquor

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Gallagher - Cross

1 did continue to fund the plan? Or let me say that a different  
2 way. At what time was the last funding payment made by Eber  
3 Wine & Liquor to the pension plan to the best of your  
4 recollection?

5 A. Yeah, it was sometime after 2009. Sorry, it was -- I know  
6 they -- they were not able to meet the minimum funding, and we  
7 were carrying a funding deficiency in our actuary reports, so I  
8 could look back and find out the date.

9 Q. And at some point after 2014 you were contacted by Wendy  
10 Eber, is that right, about updating your calculations?

11 A. Yes.

12 Q. When was that?

13 A. So it was -- the actual date I don't know, but we sent a  
14 letter to her in December of '18, so it was probably sometime  
15 in early December of 2018.

16 Q. Did you speak to anyone besides Wendy Eber about that  
17 letter?

18 A. Not that I recollect.

19 Q. To your knowledge, was that letter ever discussed either by  
20 you, or by someone you work with, with any lawyers for Wendy  
21 Eber?

22 A. I sent it to Wendy. I don't know if it was discussed  
23 between her and the -- it would have been, as far as I know,  
24 the Groom Law Firm.

25 Q. Did you ever have any interactions with a law firm called

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Gallagher - Cross

1 Underberg & Kessler?

2 A. We -- in relation to this particular matter?

3 Q. Yes.

4 A. Yeah, okay, so I believe that they were the -- worked on  
5 the pension plan document, but -- so, you know, we used the  
6 document that Eber had.

7 Q. But what pension plan document are you referring to? And  
8 one thing I should have noted is I don't know much about  
9 actuarial work or pension plans, so please explain it to me  
10 like you are explaining to someone who has no idea what you do  
11 for a living.

12 A. Okay. Sure.

13 So there is a legal document that outlines all of the  
14 provisions of how the plan will operate and that has to be  
15 maintained in accordance with IRS rules, and that's not  
16 something that we would normally do because it's a legal  
17 document. So I believe Underberg & Kessler handled their plan  
18 documents. Again, I would have to look back and just take a  
19 look and see what the status was with them. But we didn't work  
20 with them on any of these issues that I recollect.

21 Q. So is it correct that that plan document prepared by  
22 Underberg & Kessler has some effect on how you perform your  
23 calculations?

24 A. Yes. The plan document does determine how we calculate the  
25 benefits.



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Gallagher - Cross

1 Q. Sticking with 2018, were you paid for preparing that  
2 opinion letter?

3 A. Yes.

4 Q. How much were you paid?

5 A. I would have to look.

6 Q. Ballpark?

7 A. It wasn't a large amount.

8 Q. Do you remember the hourly rate?

9 A. Yeah, it was probably \$250 an hour.

10 Q. And are you being paid for your testimony here today?

11 A. I hope so.

12 Q. And is it correct you were also paid for working with  
13 defense counsel to prepare your declaration that you looked at  
14 earlier today?

15 A. I haven't billed for that, but that was my intention.

16 Q. Did you have to go through -- I'm not . . .

17 It's correct that it takes a significant amount of  
18 training and experience to perform actuarial calculations, is  
19 it not?

20 A. It does.

21 Q. And isn't it true that part of what your job entails is  
22 making educated guesses about when people will die?

23 A. Indirectly, yes. I mean, we use prepublished mortality  
24 tables, some of them required by the IRS and some are  
25 discretionary.

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Gallagher - Cross

1 Q. But isn't it true that those, at the end of the day, are  
2 simply estimates about what future funding requirements might  
3 be based on those tables, and therefore the actual amount of  
4 funding might end up being significantly different?

5 A. So the -- yeah, I'm just trying to think of the best way to  
6 answer that.

7 For example, if you pay somebody a lump-sum benefit,  
8 the mortality table that you are required to use is the table  
9 that is used to pay them their benefit. So whether or not that  
10 properly reflects the total amount of benefit paid, it is the  
11 number under IRS rules.

12 For funding purposes, you calculate a contribution and  
13 if the contribution is not sufficient in the big scheme of  
14 things, it sort of self-adjusts every year into the future as  
15 you recalculate numbers year by year.

16 Does that answer you?

17 Q. It does. I appreciate that.

18 I want to talk a little bit more about some of the  
19 specific calculations that you did here.

20 Now, is it correct that you calculated what the plan  
21 termination funding amount would have been -- I'm sorry, what  
22 the plan -- let me start over again.

23 You calculated how much money it might have -- it  
24 would have cost for Eber Brothers to terminate their pension  
25 plan on April 30, 2010, under PBGC rules, is that right?

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Gallagher - Cross

1 A. Yes. So that was the filing with the PBGC or the filing  
2 for the waiver of funding deficiency? Is that --

3 Q. Well, I am asking you. So you were trying to calculate the  
4 termination liability for purposes of your declaration in this  
5 case, correct?

6 A. Yeah, so we did a calculation in 2009 of the estimated  
7 termination liability. That was a calculation that was  
8 required to be included with the request for waiver of minimum  
9 funding.

10 Q. Okay. And as part of your testimony here, you have updated  
11 that based upon some subsequent information, is that right?

12 A. Right. We updated that number based on my letter in 2018.  
13 We updated it to June of 2012.

14 Q. And is it correct -- do you have an understanding as to  
15 whether the term "termination liability" is a larger amount of  
16 money or -- let me -- withdrawn.

17 Isn't it correct that if a pension plan is not  
18 terminated that the ultimate amount of funding that is required  
19 to fully fund the plan may be significantly different than an  
20 estimated termination liability?

21 A. Yes.

22 Q. And isn't it true that one of the factors in determining  
23 the funding amount is the current amount of principal held by  
24 the plan and what that current market value is?

25 A. Correct.

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Gallagher - Cross

1 Q. So if you were to value the plan as of today, when the  
2 stock market is not quite still at an all-time high, but very  
3 high, isn't it likely that the amount of funding that would  
4 have been required would have been less?

5 A. Yes, right, had we known that.

6 Q. Right.

7 As -- let's take a look at an exhibit, Exhibit DDDD,  
8 and only looking at the first page.

9 This is a -- you recognize this e-mail, Mr. Gallagher,  
10 correct?

11 A. Yes.

12 Q. And this is something that you, I guess -- is it correct  
13 that you yourself determined what the numbers were in here?

14 A. So the benefits for all the participants in the plan were  
15 calculated by the prior actuary at the time that the benefit  
16 amounts were frozen. So December 31, 2000, all benefits were  
17 frozen under the plan and nobody earned additional benefits for  
18 service after December 31, 2000. So the prior actuary  
19 calculated all of the accrued benefits at that point in time.

20 Q. Did you ever check the prior actuary's work?

21 A. No.

22 Q. Okay. And so is it correct that the benefit amount listed  
23 here of \$10,860.69, that's the amount that you received from  
24 the company as the prior actuary's work?

25 A. Well, so the 10,860 is adjusted for a couple of reasons,

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Gallagher - Cross

1 and we did do the adjustments. The benefit, when somebody  
2 works past their normal retirement date, which age 65, I  
3 believe, in this plan, is adjusted actuarially if they don't  
4 start taking their payment. So that way if they -- if they  
5 could have taken their payment, let's say, at age 65 and they  
6 decide to take it at 66, the benefit is increased to reflect  
7 the fact that they didn't take their payment. So --

8 Q. And -- sorry. Continue. I didn't mean to cut you off.

9 A. Yeah, okay.

10 So Lester deferred his retirement past age 65, so we  
11 had to increase the benefit that the prior actuary calculated  
12 for the number of years that he deferred his payment past 65.  
13 And then the payment under the plan is normally paid as a life  
14 annuity, and in this case he elected a joint and survivor  
15 benefit with his spouse as beneficiary, and so we needed to  
16 make an adjustment to the life only benefit, because the  
17 benefit in effect is going to be paid over a joint lifetime,  
18 and so it needs to be adjusted accordingly.

19 Q. You are probably better at this math than I am, but at what  
20 age -- I guess Lester -- he was 69 when he started taking his  
21 retirement benefit, is that right?

22 A. I have that here. I have to look. Sorry.

23 Q. 1938 to 2007, I think that's right.

24 A. Yeah, okay, that's correct.

25 Q. All right. And so was the amount, \$10,860, the same amount

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Gallagher - Cross

1 from September 2007 going forward each month?

2 A. It -- yes. Once he started taking his pension, it would  
3 have stayed at the \$10,860 unless he passed away, and then half  
4 of that would have gone to his spouse for the rest of her life.

5 Q. All right. Let's look at the next paragraph. You said the  
6 next closest benefit is for a person currently age 62 with a  
7 monthly benefit of \$2,172.65, payable as a 10 C & C. First  
8 off, what does a 10 C & C mean?

9 A. That's a ten-year certain and continuous. So instead of  
10 electing a life-only benefit, a person could say I want to make  
11 sure that this benefit is paid for at least ten years, so if  
12 they die within the first ten years of receiving, starting to  
13 receive, their beneficiary would get the remainder of the  
14 ten-year payment.

15 Q. Okay. And so is it correct that what you are saying here  
16 is that Lester's current benefit as of 2014 was approximately  
17 five times the next highest benefit amount being paid by the  
18 pension?

19 A. So just looking at those numbers could be deceptive,  
20 because the benefits were based on years of service and  
21 compensation. It could be that that person that I mentioned  
22 had a short number of years of service versus Lester's who he  
23 had quite a few years of service. But just looking at the math  
24 that you offered, yes, it looks like about five times.

25 Q. And did you ever look to see what percentage of total

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Gallagher - Cross

1 benefit payments under the pension plan were going to Lester  
2 Eber alone?

3 A. No.

4 Q. All right. Let's take a look at Exhibit CCCCC, that's five  
5 Cs, at page 13. I just want to first get us on the same page  
6 here.

7 This is a plan document of some kind. Am I correctly  
8 reading this line here that it says that there were 184 people  
9 that were in the plan?

10 A. So there were 184 retired participants and beneficiaries.

11 Q. Okay. And if we need to, maybe, Ali, zoom out, just so --  
12 so if you can zoom in on the whole Section A, please, so we can  
13 see that, so from A(1) to (6).

14 So does that mean that -- so 430 is the total number  
15 of participants, is that right?

16 A. Yes.

17 Q. So 246 people as of the date of this exhibit were no longer  
18 receiving anything out of the pension plan, is that right?

19 A. So the -- they are terminated participants with deferred  
20 benefits so they would be eligible to start receiving when they  
21 reached their retirement date.

22 Q. Okay. Again, apologies. I don't know anything about this  
23 stuff.

24 A. Okay.

25 Q. Let's now look at Exhibit NNN, which is apparently an

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Gallagher - Cross

1 audited financial statement for the plan for 2011 and 2012. We  
2 are looking specifically at page 5.

3 And Ali, could you actually zoom out and make sure so  
4 that we get the years in there above that?

5 So am I reading this correctly as saying that in 2011  
6 there was a little over \$778,000 that was paid out from the  
7 plan to different participants?

8 A. Yes.

9 Q. And then that number dropped to \$593,688 in 2012. Am I  
10 reading that right?

11 A. Yes.

12 Q. Do you know why there was such a significant drop from 2011  
13 to 2012?

14 A. So most likely the plan allows individuals to take a  
15 portion of their benefit as a lump-sum payment and then the  
16 remainder of their benefit as an annuity, and so I am just  
17 guessing maybe in 2011 people that elected their benefit  
18 decided to take lump-sum payments, and so it inflated the -- or  
19 the annual payments to include a one-time lump-sum payment.

20 Q. And based on your involvement with the plan, you have no  
21 idea what would have caused a bunch of plan participants to  
22 want to try to cash out early, is that right? Or do you?

23 A. Well, no, we don't receive information on why they want to  
24 cash out. We just are asked to calculate the benefit.

25 Q. Was it your understanding that in and around 2010 or 2011



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Gallagher - Cross

1 there were notices to participants being sent about how the  
2 plan was seeking, what is it, a change in how it was going to  
3 be funded or a deferral of funding?

4 A. The minimum funding waiver?

5 Q. You got it. Yes.

6 A. Yes. So that would have been a required notice to go to  
7 participant if there was going to be a request for minimum  
8 funding.

9 Q. So just looking at, you know, 2012 now, so let's round that  
10 up, say it's \$600,000 -- I am going to assume that you are  
11 going to follow the math with me on this, because I'm sure you  
12 are much better at it than I am -- and Lester was getting a  
13 little over \$10,000 a month. Let's say that's 120,000. Is it  
14 fair to say that Lester Eber's pension alone accounted for  
15 approximately 20 percent of the pension benefits being paid by  
16 the Eber Brothers pension plan for the year 2012?

17 A. Yes. If he was getting that 10,000 at that point in time.

18 Q. And he wasn't even retired, was he?

19 A. I don't know the answer to that. He was receiving his  
20 payment based on the fact that he was past retirement date.

21 Q. And did you ever make any calculations of how much the  
22 pension funding shortfall would have been if Lester Eber had  
23 not started receiving his pension starting in September 2007?

24 A. Not directly, but the short -- that wouldn't affect the  
25 shortfall, because whether someone is in payment status or not,

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1 their benefit still has a value.

2 Q. Okay. But -- okay. So it still has a value, so whether  
3 they are taking it or not. But if they are taking money out of  
4 the plan, isn't it true that then more money has to go into the  
5 plan at the current time?

6 A. So if they are taking money out, they are also -- the value  
7 of their benefit is going down. So it's possible that it is  
8 just a wash, that the amount going out is equal to the  
9 reduction in the liability, and especially -- it depends again,  
10 as you mentioned before, what the investment return is on the  
11 plan assets.

12 Q. Right. And it's another factor that what I as a layperson  
13 would call the time value of money or the discount rate that  
14 needs to be applied. So isn't it correct that 120,000 in 2007  
15 might be significantly more value than 120,000 in 2017?

16 A. Yes, if you were looking at it in -- yes, correct.

17 MR. BROOK: Okay. Thank you, Mr. Gallagher. No  
18 further questions.

19 THE COURT: Thank you.

20 Any redirect?

21 MR. MULRY: No questions, your Honor.

22 THE COURT: All right. You are excused. Thank you,  
23 Mr. Gallagher.

24 THE WITNESS: Okay. So I just log off?

25 THE COURT: Yes, you may leave the conference.

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Torchio - Direct

1 THE WITNESS: Okay. Thank you very much.

2 (Witness excused)

3 THE COURT: Next witness, please.

4 MR. MULRY: Defendants call Frank Torchio.

5 THE COURT: You may proceed.

6 MR. BROOK: Your Honor we need Mr. Mohan's help to get  
7 Microsoft Teams off the system.

8 THE COURT: Let's track him down.

9 (Pause).

10 FRANK C. TORCHIO,

11 called as a witness by the defendants,

12 having been duly sworn, testified as follows:

13 THE COURT: All right. Let's go. Thank you.

14 DIRECT EXAMINATION

15 BY MR. MULRY:

16 Q. Good morning, Mr. Torchio.

17 A. Good morning.

18 Q. You have been retained as an expert economist by the  
19 defendants in this case, is that correct?

20 A. Yes.

21 Q. Did you work with me to prepare a declaration that  
22 constitutes your direct testimony in this case?

23 A. Yes.

24 Q. Okay. Can we show you what's been marked as Defendant's  
25 Exhibit DC, declaration of Frank C. Torchio.

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Torchio - Direct

1 A. Okay.

2 Q. Is that your direct testimony declaration?

3 A. It is.

4 Q. Did you review that declaration carefully?

5 A. I did.

6 Q. Going to the last page, did you sign that declaration under  
7 penalty of perjury?

8 A. Yes.

9 Q. But do you reaffirm your direct testimony here today?

10 A. Yes, I do.

11 MR. MULRY: Your Honor, defendants offer the  
12 declaration of Frank Torchio which has been marked as  
13 Defendant's Exhibit ZC as his direct testimony.

14 THE COURT: I'm sorry. Is that Z as in "zebra" or D  
15 as in "David."

16 MR. MULRY: Z as in "zebra," C as in "Charlie."

17 THE COURT: Thank you.

18 MR. BROOK: No objections.

19 MR. MULRY: Your Honor, defendants also move into  
20 evidence the exhibits to Mr. Torchio's declaration, which are  
21 marked as Defendant's Exhibits TA through TF and Mr. Torchio's  
22 demonstratives which are marked as Defendant's Exhibit TG.

23 THE COURT: All right. First of all, defendant's ZC  
24 is received.

25 (Defendant's Exhibit ZC received in evidence)

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Torchio - Direct

1 THE COURT: What about the others?

2 MR. BROOK: I think these are new exhibit numbers that  
3 I think were just added recently, but assuming that they are  
4 what I have seen before and that there is nothing sort of snuck  
5 in there, there is no objection to that.

6 MR. MULRY: Your Honor, I can represent to the Court  
7 that the six exhibits marked A through F that were part of  
8 Mr. Torchio's declaration have just been renumbered, for  
9 consistency, to be TA through TG and it is demonstratives which  
10 were previously provided to Mr. Brook and the Court in  
11 connection with the pretrial package has just been marked as  
12 Defendant's Exhibit TG.

13 THE COURT: All right. They are all received.

14 MR. BROOK: I will actually note just for the  
15 record -- I apologize, I mentioned this earlier -- plaintiffs  
16 do have a motion as to Mr. Gallagher's testimony, to the extent  
17 that Mr. Torchio's, and part of our motion which we already  
18 have filed does involve Mr. Torchio's reliance on certain  
19 statements and opinions made by Mr. Gallagher as well.

20 THE COURT: All right. They are all received subject  
21 to the pending objections.

22 (Defendant's Exhibits TA through TG received in  
23 evidence)

24 MR. MULRY: Your Honor, we would ask that we can  
25 address with Mr. Torchio several areas that were raised in the

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Torchio - Direct

1 plaintiff's case, primarily the testimony of Mr. Liebman and  
2 the testimony of Mr. Eder, which will be brief.

3 MR. BROOK: I would object to Mr. Liebman only insofar  
4 as I don't know that he said anything that's not already been  
5 said before, maybe just slightly differently, but there is no  
6 objection to asking questions about what Mr. Eder said because  
7 that was new information for all of us, well, all of us  
8 lawyers.

9 THE COURT: Well, so far as you are concerned with  
10 Mr. Eder, there is no objection, so you may do that.

11 As to the other witness, Liebman, you can ask your  
12 questions; and if you want to preserve an objection, you will  
13 have to object.

14 MR. BROOK: Yes, your Honor.

15 THE COURT: Okay. Let's go ahead.

16 BY MR. MULRY:

17 Q. Mr. Torchio, one of the metrics that you used in your  
18 valuation is a 2008 purchase by Eder-Goodman of a 15 percent  
19 interest in Eber-Connecticut, is that correct?

20 A. Say that again, please.

21 Q. I'm sorry. One of the metrics you used in your valuation  
22 is a 2008 purchase by Eder-Goodman of a 15 percent interest in  
23 Eber-Connecticut?

24 A. That's correct.

25 Q. Have you ever read Andrew Eder's testimony from last

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Torchio - Direct

1 Tuesday?

2 A. Yes, I have.

3 Q. I will direct your attention, if we could put this up, to  
4 his trial testimony at page 144/line 9 through 145/line 1 with  
5 respect to a liquidation preference.

6 If you could read that to yourself.

7 A. Yes.

8 Q. Does Mr. Eder's statement with respect to a liquidation  
9 preference have relevance to your assessment of the  
10 Eder-Goodman metric?

11 A. Well, he seems -- he agrees that it is consistent with a  
12 convertible preferred equity security.

13 Q. And does that affect your evaluation with respect to the  
14 performance of the liquidation preference to your valuation?

15 A. Well, it certainly is consistent with my opinion that it is  
16 valuable, yeah.

17 Q. Also, did you read in Mr. Eder's testimony that he said an  
18 attorney for Eber-Connecticut, Pat Dalton, told him that  
19 Southern would be in the transaction, that Lester Eber would  
20 prefer Eder-Goodman, and that it would cost Eder-Goodman 4.5  
21 million for 15 percent of Eber-Connecticut?

22 A. I do recall that.

23 Q. Did you read Mr. Eder's testimony that "there was zero due  
24 diligence basically" --

25 THE COURT: Look, counsel, this is not a help. I

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Torchio - Direct

1 understand he can read. I got that right away. So if you have  
2 a specific question, let's get to it.

3 BY MR. MULRY:

4 Q. Do those statements from Mr. Dalton and the fact that there  
5 was limited due diligence have some effect on your valuation?

6 A. Well, I think it is consistent with the notion that  
7 Eder-Goodman did not -- were not aware of the liabilities, the  
8 pension liabilities and the Teamsters' liabilities because they  
9 did not conduct the due diligence.

10 Q. Did you read Mr. Eder's testimony with respect to --

11 THE COURT: Look, that's a waste of time. We are  
12 going nowhere with that. It is consistent also with they knew  
13 the business so well that they didn't have to do due diligence.  
14 Both are consistent.

15 MR. MULRY: I will move on, your Honor.

16 BY MR. MULRY:

17 Q. Did you read his testimony with respect to the right of  
18 first refusal?

19 A. Yes.

20 Q. And he testified that that was an important piece that they  
21 paid more for. Why, in your view, is a right of first refusal  
22 important?

23 MR. BROOK: Objection, your Honor. This is all in his  
24 testimony already.

25 THE COURT: Sustained.



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Torchio - Direct

1 MR. MULRY: Paragraph -- if we could go to  
2 Mr. Liebman's direct testimony in his declaration, at paragraph  
3 51.

4 THE COURT: What's the number, please?

5 MR. MULRY: It's paragraph 51.

6 THE COURT: 51 or 61?

7 MR. MULRY: Five one.

8 THE COURT: Thank you.

9 BY MR. MULRY:

10 Q. If you could read paragraph 51 to yourself, and  
11 particularly the second sentence.

12 A. Okay.

13 Q. The second sentence of paragraph 51, he characterizes what  
14 you did and he says you treated the additional rights as if  
15 they were full, unfettered control over Eber-Connecticut. Is  
16 that what you did?

17 A. No, I disagree with that characterization.

18 Q. Why do you disagree?

19 A. Well, "unfettered" means that there is unrestricted  
20 control, and that's not what I am saying. I am saying that the  
21 right of first refusal, along with the other rights that were  
22 granted to Eder-Goodman, would effectively eliminate the  
23 potential for a control premium of any kind of magnitude.

24 Q. Would eliminate a control premium when? What are you  
25 referring to there?

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Torchio - Direct

1 A. Control premium for the 79 percent of an ownership.

2 Q. And if there were a later buyer that was seeking to  
3 purchase the 79 percent interest, why is it that the ROFR would  
4 affect their -- their view of control of the company?

5 A. So the first issue is that a ROFR will deter takeover  
6 prospects. It is pretty well established in economics that  
7 when you have a ROFR, the potential bidders are going to be  
8 reluctant to come forward because it costs money, it costs time  
9 to go ahead and try to engage in the process of a takeover.  
10 Negotiations, due diligence, all that stuff takes time and  
11 effort, and if it's all for naught, it will deter and push off  
12 those kinds of activities.

13 Secondly, you must remember that a control premium is  
14 not something that's given on high. A control premium is  
15 dictated by economics, the economics being, here, is the  
16 standalone or the existing value of the company; and a buyer  
17 says, well, I can take this company and I could increase the  
18 value of this company by some amount, and he is willing to pay  
19 some fraction of that amount in terms of a control premium to  
20 be able to exact that kind of value-enhancing strategy. Well,  
21 the problem here is that the biggest value enhancing strategy  
22 would be to get new suppliers, new products for  
23 Eber-Connecticut to distribute. Well, but if you look at the  
24 rights that Eder-Goodman has, that becomes very difficult,  
25 because it's axiomatic in finance that in order to fund -- in

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1 order to have growth, you have got to fund growth.

2 Well, funding growth means you have got to have -- in  
3 the case of Eder-Goodman, you have got to have money for  
4 working capital to increase your inventory. That's for sure.

5 Second, you have got to have enough warehouse space.  
6 So they would have to increase warehouse space. Trucks, as  
7 well. Those are all the components of the distribution network  
8 that they have. So in order to do that, you have got to have  
9 funding.

10 Now, Eder-Goodman, in its, you know -- when it was  
11 told 4.5 million, it introduced many conditions, two of those  
12 conditions being the following:

13 One, that Eber-Connecticut cannot increase its  
14 leverage without consent, so they have veto power over  
15 increasing leverage-generating funding through debt issuances.

16 Second, Eder-Goodman has the veto power over issuing  
17 new units. So equity issuance, money from equity issuance is  
18 not there.

19 So now a prospective buyer is going to look at this  
20 and say, well, what are my opportunities here to increase the  
21 value of this company above its standalone value if I am not  
22 able to fund that through or at least Eder-Goodman has that  
23 right to veto the funding? So that, again, the combination of  
24 the ROFR itself and these other rights severely limit any kind  
25 of value that could be created through control of that 79

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1 percent.

2 Q. Okay. Another metric you used was a company called Farmers  
3 Brothers.

4 A. Yes.

5 Q. Okay. And last week, during Mr. Liebman's testimony with  
6 respect to Farmers Brothers -- and this was at page 199/lines  
7 4-5, we don't need to put it up -- the Court said that "I can't  
8 wait to hear how coffee and tea is equivalent to alcoholic  
9 beverages."

10 Could you explain why is it you consider Farmers  
11 Brothers to be a good metric to use for valuation?

12 A. Well, first off, your Honor is correct that they are not  
13 similar products, but nowhere in the literature --

14 THE COURT: I'm bound to get something right once in a  
15 while.

16 A. -- but nowhere in the literature of developing comparable  
17 companies does it say that the products have to be similar or  
18 even in the same category. That is not one of the criteria  
19 that's used. In fact -- well, in any event, it's not one of  
20 the criteria used.

21 What is important in this case and why Farmers is  
22 comparable is because of the operations of this company  
23 relative to the operations of Eber-Connecticut. By that I mean  
24 that both companies are engaged in logistics. They are moving  
25 products. They are getting products from manufacturers, and

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1 they are selling those products to retail establishments, to  
2 stores, to restaurants, casinos, those kinds of establishments.  
3 They are both engaged in net facilities. What do they have to  
4 do in order to make those things happen? Well, they have got  
5 to have inventory, they have got to have a warehouse space, the  
6 capital expenditures of warehouse space, the working capital  
7 investment in inventories, in order to distribute these  
8 products.

9 Both products, by the way, are beverages. Obviously  
10 alcohol versus tea but they are both beverages. And economics  
11 would dictate that in a competitive marketplace, which these  
12 distribution networks are, in a competitive marketplace, what  
13 you are going to see is that the return is going to be  
14 equivalent to the marginal cost of this business. These are  
15 not monopolist. These are competitive businesses.

16 So what you are going to observe is that the cost  
17 structure is going to be very similar. And the cost structure  
18 is similar because Farmers has, as I said, key, tangible  
19 assets -- warehouses, trucks, for example. They have similar  
20 intangible assets, the relationship they have with suppliers  
21 and customers, they have a team -- both have teams of regional  
22 salespeople that are responsible for selling, collecting, and  
23 maintaining customer accounts.

24 And then specifically, some of the companion variables  
25 here that are important is that Farmers, like Eber-Connecticut,

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1 was experiencing income losses in the years leading up to the  
2 valuation.

3 And in addition to that, both companies are mature  
4 businesses, and the size of Farmers, Farmers, it was a publicly  
5 traded company, is a publicly traded company, and at the time  
6 of the valuation, Farmers was in the smallest decile market  
7 capitalization for traded firms, and Eber-Connecticut would  
8 also be in that smallest decile based upon these valuations.

9 So there are, I think, very considerable similarities  
10 between these businesses, how these businesses are run, that  
11 makes these two businesses comparable and that, in my view, it  
12 would be remiss to put zero weight on the comparable analysis  
13 from Farmers.

14 Q. Why do you say it would be remiss to put zero weight on  
15 that comparable?

16 A. Because, I mean, look, the valuation from Farmers comes  
17 from the stock market, the efficient stock market. And so this  
18 is a marketplace where there are many, many, many investors,  
19 and what you have is a consensus. This is how investors are  
20 looking at companies like this at this point in time, and it's  
21 not based on one, two, or three, but it's based on many, many  
22 investors who are buying and selling this stock contemporaneous  
23 to the valuation date. That provides very important  
24 information to investors, and I can't imagine an investor that  
25 would say I don't want to know anything about how companies

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1 like this, how logistics companies are being valued in the  
2 marketplace.

3 Q. Okay. You used five metrics in your valuation, is that  
4 correct?

5 A. Yes.

6 Q. Is it necessary for you, as a business valuation expert, to  
7 choose one of those over the others in coming to a valuation?

8 A. Well, you know, for example, in Delaware they have what  
9 they call the Delaware block method, which is assigning weights  
10 to different measures. So you might have one weight being  
11 assigned to your transaction multiples, one weight being  
12 assigned to your trading multiples, one weight being assigned  
13 to a DCF analysis, one to, you know, a capitalization of  
14 earnings, perhaps another if there is a prior transaction. And  
15 the concept here is to assign weights to those various metrics,  
16 and then you can, if you will, get a point valuation.

17 So what I -- what I am talking about here is assigning  
18 some 20 percent weight to each of these five metrics.  
19 Obviously that is somewhat subjective. The Court may decide  
20 that certain weights should be applied to certain of these  
21 transactions. However, I feel very strongly that zero weight  
22 assigned to Farmers would be incorrect.

23 Q. Another metric you used was the Prospect Beverages?

24 A. That's correct.

25 Q. Why do you consider Prospect Beverages to be a good metric

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Torchio - Direct

1 for valuation of Eber-Connecticut?

2 A. Well --

3 MR. BROOK: Objection, your Honor. At this point I  
4 think we are just rehashing what is already in his testimony.

5 THE COURT: I agree. Sustained.

6 BY MR. MULRY:

7 Q. Mr. Torchio, are you aware that in Mr. Liebman's expert  
8 report he offered an opinion as to the value of  
9 Eber-Connecticut in 2018?

10 A. Yes.

11 Q. And you responded to that opinion on 2018 on your  
12 deposition testimony in this case, correct?

13 A. I did.

14 Q. Did you read Mr. Liebman's direct testimony offering an  
15 opinion on the value of Eber-Connecticut in 2020?

16 A. Yes.

17 Q. What is your response to Mr. Liebman's testimony that he  
18 gave on Tuesday with respect to 2020?

19 MR. BROOK: Objection, your Honor. The defense had an  
20 opportunity to put in a rebuttal report to Mr. Liebman's  
21 testimony on the current -- approximate current value of the  
22 company and they declined to style a report, so the opportunity  
23 for them to offer a new opinion --

24 THE COURT: When did that happen?

25 MR. BROOK: That was back in 2019.



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Torchio - Direct

1 THE COURT: Well, in 2019 he couldn't have given an  
2 opinion on 2020, could he?

3 MR. BROOK: No, and I would make the same objection to  
4 2018, your Honor, because, you know, it is one thing for me to  
5 try to see what he is going to say in a deposition, to try to  
6 see what he is going to do, but it is another thing for them to  
7 offer it as affirmative evidence as an opinion.

8 They have had the benefit of Mr. Liebman having had a  
9 report that provides the opinion in terms of the formula he  
10 used identical 2018 to 2020. I have no idea what formula or  
11 multiples or anything this witness is going to testify to about  
12 the current value of the company because they have never put in  
13 a report. There were three, just for background, because I  
14 know it was Judge Parker, but there were three expert  
15 deadlines. There was the defense report. Because of the  
16 entire fairness doctrine, the burden was on them. Then there  
17 was the plaintiff's report deadline. Then there was the  
18 defense rebuttal deadline. And they declined to put in a  
19 rebuttal to Mr. Liebman's opinion that was stated for the first  
20 time in the -- in the plaintiff's report. So therefore they  
21 have waived the opportunity to offer an expert opinion on how  
22 to value Eber-Connecticut after 2012.

23 MR. MULRY: Your Honor, there is no question  
24 Mr. Torchio addressed the 2018 valuation in his deposition  
25 testimony, so the plaintiffs have been aware of what his

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1 responses are for that. We objected to the 2020 valuation  
2 because the first time we received it was in the submissions  
3 earlier this month, the pretrial submissions. So we objected  
4 on that ground. I think it is a fair opportunity for  
5 Mr. Torchio to respond to the trial testimony, given last week,  
6 as something that should be afforded to him.

7 THE COURT: Where was defendant's objection to  
8 Liebman's 2018 opinion?

9 MR. BROOK: They made the same objection, your Honor,  
10 and if I recall correctly, they objected to any opinion of  
11 value from after 2012. He is only mischaracterizing it now --

12 THE COURT: On what ground.

13 MR. BROOK: On the grounds I think they are saying it  
14 is irrelevant based upon Judge Parker's order.

15 THE COURT: Is that correct?

16 MR. MULRY: Yes. We made the argument to your Honor  
17 that any time period after 2012 was not relevant. Your Honor  
18 received that testimony from Mr. Liebman subject to that  
19 objection.

20 THE COURT: Yes.

21 MR. MULRY: And since that's been subject to the  
22 objection --

23 THE COURT: But you didn't object to Mr. Liebman on  
24 the ground that there hadn't been appropriate expert  
25 disclosure, did you?

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1 MR. MULRY: On 2020?

2 THE COURT: On 2018.

3 MR. MULRY: On 2018, no. That was -- that was prior  
4 counsel. But there was not an objection based on a failure to  
5 disclose, no.

6 THE COURT: Okay. But this objection is on failure to  
7 disclose. Am I right?

8 MR. BROOK: Yes, your Honor.

9 MR. MULRY: It was certainly disclosed in his  
10 deposition testimony, in Mr. Torchio's deposition testimony.

11 THE COURT: 2020.

12 MR. MULRY: No, 2018. 2020 has not appeared until  
13 September 3rd or 7th.

14 THE COURT: You objected to Liebman on 2020 --

15 MR. MULRY: Yes.

16 THE COURT: -- if I understand correctly, solely on  
17 grounds of relevance, not on grounds that haven't --

18 MR. MULRY: No. We objected also, your Honor, on  
19 grounds it was not in the expert report, that 2020 was not in  
20 the expert report.

21 MR. BROOK: I think your Honor might be flipping the  
22 dates on this one. 2018 is the one where they -- 2018 was in  
23 Mr. Liebman's expert report, so there is no objection to that  
24 not having been in there; and 2020 is the update, and they  
25 contend that even though it is just updating numbers, it's a

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1 new opinion. That was an objection that they made.

2 Now I am making the objection that this actually is a  
3 new opinion, not because he is using 2020 numbers rather than  
4 2018, but because he never offered any opinion in any report of  
5 a value after 2012.

6 THE COURT: How about that?

7 MR. MULRY: Well, he certainly did respond to it in  
8 his deposition testimony in this case. He was asked questions  
9 about the 2018 valuation. He responded. He gave his response  
10 there. If Mr. Liebman is permitted to update that to 2020,  
11 then I believe Mr. Torchio should be able to respond and give  
12 the Court the response similar to the one he gave in his  
13 deposition.

14 (Continued on next page)

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1 THE COURT: I will listen to it and I'll consider this  
2 more carefully down the road. I'm inclined to the view that  
3 it's out, but I'll listen to it and we'll have a complete  
4 record.

5 BY MR. MULRY:

6 Q. Mr. Torchio, could you provide your response to  
7 Mr. Liebman's testimony with respect to a 2020 valuation?

8 A. Sure. What I did is convert Mr. Liebman's analysis into  
9 what is called an EBITDA ratio. That is, Mr. Liebman's  
10 enterprise value as of 2020 of Eber-Connecticut divided by the  
11 EBITDA before interest depreciation and amortization as a  
12 ratio. I do that because at that point in time, there was  
13 positive EBIDTA for Eber-Connecticut. EBIDTA valuation ratios  
14 are probably the most widely used valuation ratios.

15 MR. BROOK: Your Honor, may I just request the witness  
16 speak a little more slowly so I can try to get down what he's  
17 saying?

18 THE COURT: I'm not getting it either.

19 A. I'm sorry. Excuse me. Let me back up.

20 So EBITDA ratios are the most widely used ratios in  
21 valuation. And what I did is to convert what Mr. Liebman's  
22 valuation was into a ratio by dividing his enterprise value for  
23 Eber-Connecticut by the EBITDA for Eber-Connecticut. That  
24 number is 27. So 27 times EBITDA.

25 What I did then is, I looked into the stock market as

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Direct - Torchio

1 of that valuation date and looked at all stocks traded on the  
2 New York Stock Exchange and NASDAQ stock exchange and ranked  
3 them and ranked them from high to low by the EBITDA ratios.  
4 And the 27 times ratio that Mr. Liebman, that obtains from  
5 Mr. Liebman's valuation, would have put Eber-Connecticut in the  
6 top 15 percentile of all companies traded on the New York Stock  
7 Exchange and the NASDAQ stock exchange.

8 Now, from there, what I looked at was the median  
9 growth rate for the last three years for companies in that  
10 15 percentile ranking for those traded stocks. The average  
11 three-year annual growth rate for companies, or I should say  
12 the median for the three-year average growth rate for companies  
13 in that percentile, was 12 percent.

14 In contrast, I looked at the three-year compounded  
15 annual growth rate --

16 THE COURT: Growth rate in what?

17 THE WITNESS: I'm sorry. EBITDA. Excuse me.

18 THE COURT: Go ahead.

19 A. Growth rate in EBITDA, and that was two and a half percent.  
20 So there is a big difference between how companies are being  
21 valued at 27 times EBITDA versus how companies that would have  
22 a lower growth rate, historic growth rate, would be valued. So  
23 that -- that presented, I believe, an inconsistency with the  
24 valuation that Mr. Liebman obtained.

25 MR. MULRY: Thank you, Mr. Torchio.

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Cross - Torchio

1 THE COURT: OK. Cross-examination.

2 MR. BROOK: Yes, your Honor.

3 CROSS-EXAMINATION

4 BY MR. BROOK:

5 Q. Hello again, Mr. Torchio. You remember me, I assume?

6 A. I do. Good morning.

7 Q. I hope the trip wasn't too bad for you.

8 Let's start with the last little bit we were talking  
9 about while it is fresh in my head, make sure I'm understanding  
10 you correctly.

11 So is it fair to say your chief criticism of  
12 Mr. Liebman's 2020 valuation is that it results in an EBITDA  
13 multiple or EBIDTA ratio that is too high considering the  
14 growth rate of the company?

15 A. Yes. The historic growth rate or the last three years'  
16 growth for Eber-Connecticut. In fact, you can go back further  
17 than three years, but just looking at the three years, it  
18 doesn't seem to warrant the kind of EBIDTA multiple that  
19 obtains from Mr. Liebman's valuation.

20 Q. You said that you compared it against the public stock  
21 market as of the valuation date, correct?

22 A. Yes.

23 Q. So you used May 31, 2020?

24 A. Whatever the date was that Mr. Liebman used for his  
25 valuation.

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Cross - Torchio

1 Q. All right. Was May 2020 a particularly good year for the  
2 public stock market, good month for the stock market?

3 A. A good month? I mean, I think this has been a pretty good  
4 bull run for the market, yes.

5 Q. Sure. That had started a little before May 2020, correct?

6 A. Sure, yes.

7 Q. And that's because there was a dramatic plummet in March of  
8 2020, correct?

9 A. Yes.

10 Q. And it took several months before valuations even  
11 approached their pre-pandemic levels, correct, putting aside  
12 technology stocks?

13 A. I just don't remember. It could well be.

14 Q. Did you attempt to -- in looking at the public stock  
15 market, did you attempt to distinguish between different  
16 sectors of the stock market?

17 A. No. I did what I did.

18 THE COURT: Well, I think that goes without saying.  
19 Look, let me see if I can clarify something here for a minute.

20 You said that you converted Mr. Liebman's valuation  
21 into a ratio with respect to EBITDA, E-B-I-T-D-A?

22 THE WITNESS: That's correct.

23 THE COURT: And you got, the figure was 27, right?

24 THE WITNESS: Yes.

25 THE COURT: Sir?



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Cross - Torchio

1 THE WITNESS: Yes, that's correct.

2 THE COURT: And then you looked at all the stocks  
3 traded on NASDAQ and the New York Stock Exchange and ranked  
4 them by EBITDA; yes?

5 THE WITNESS: By the EBITDA ratios, your Honor.

6 THE COURT: Yes. Excuse me. I stand corrected.

7 You concluded that Mr. Liebman's valuation, which  
8 produced an EBITDA of 27, was too high, put it in the top  
9 15 percent of all companies traded on those exchanges, because  
10 you looked at the growth rate for the last three years for  
11 companies in the 15th percentile on the stock exchanges ranked  
12 by EBITDA ratios; yes?

13 THE WITNESS: That's correct.

14 THE COURT: And I asked you, growth rate of what?

15 THE WITNESS: This would be the growth rate of revenue  
16 in EBITDA.

17 THE COURT: Well, that's not what you said before.  
18 What you said before was that it was the growth rate in EBITDA.

19 THE WITNESS: Right.

20 THE COURT: Was that accurate?

21 THE WITNESS: No. I think it's the growth rate of  
22 revenue. I must have misspoke.

23 THE COURT: Yeah, I think so. Because if, in fact, it  
24 was what you said before, your entire discussion was completely  
25 and absolutely circular, as I understand it.

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Cross - Torchio

1 THE WITNESS: Yeah. It is growth rate in revenue that  
2 I focused on, your Honor. Excuse me if I said EBITDA, I  
3 apologize.

4 THE COURT: So you were comparing then growth rates  
5 of all the companies on the stock exchanges in the top  
6 15 percentile, right?

7 THE WITNESS: Yes.

8 THE COURT: With this privately held beer and liquor  
9 distributor in Connecticut; yes?

10 THE WITNESS: Yes.

11 THE COURT: OK.

12 THE WITNESS: Sorry.

13 BY MR. BROOK:

14 Q. We will actually get to this later. It's your  
15 understanding, Mr. Torchio, Eber-Connecticut did not sell beer,  
16 right?

17 THE COURT: I cannot understand a word you said.

18 MR. BROOK: I just wanted to make sure, it is  
19 important later that, because your Honor said beer and liquor.

20 Q. It is actually high-end wines that Eber-Connecticut sold,  
21 right, Mr. Torchio?

22 A. I believe liquor as well.

23 Q. And liquor, yes.

24 But not beer?

25 A. That's correct.

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Cross - Torchio

1 Q. To your knowledge, they have never sold beer?

2 A. That's correct.

3 THE COURT: So inherit in your comparison here is  
4 Apple, Microsoft and the like; yes?

5 THE WITNESS: Sure, they are included in the thousands  
6 of companies.

7 THE COURT: Right. OK.

8 MR. BROOK: Let's not forget Tesla, which I think has,  
9 perhaps, the highest of any of the multiples.

10 THE COURT: OK.

11 THE WITNESS: I don't know if that's true.

12 MR. BROOK: It may have one point.

13 THE COURT: Look, Mr. Torchio, this isn't a seminar,  
14 and your job is just to answer the questions, not to get into  
15 an interesting discussion, however interesting it might be.

16 THE WITNESS: Yes, sir.

17 BY MR. BROOK:

18 Q. We can talk about that later.

19 EBITDA includes things like administrative and general  
20 expenses, correct?

21 A. Yes.

22 Q. So it's only excluding interest, taxes, depreciation and  
23 amortization, correct?

24 A. That's correct.

25 Q. So things like extraordinary legal expenses would have

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Cross - Torchio

1 affected Eber-Connecticut's EBITDA numbers, correct?

2 A. Sure.

3 Q. Even just ordinary legal expenses, correct?

4 A. Sure, yes.

5 Q. And also any salaries paid to officers would have been  
6 included in that and, therefore, reducing the amount of EBITDA,  
7 correct?

8 A. Sure, just like any other company, yes.

9 Q. And that included, in the case of the 2020 numbers, a death  
10 benefit paid to Lester Eber's estate, correct?

11 A. That, I don't know.

12 Q. So you didn't -- in trying to examine the EBITDA of the  
13 company, you didn't make any attempt to try to normalize it  
14 based on extraordinary expenses?

15 A. Well, to answer your question, I didn't try to normalize  
16 any of the thousands of companies, as well as Eber-Connecticut.

17 THE COURT: How about answering the question he asked?

18 THE WITNESS: No, I didn't. I didn't normalize any  
19 company, including Eber-Connecticut.

20 Q. So off the top of your head, what was Eber-Connecticut's  
21 EBITDA in 2020, do you remember?

22 A. No, I don't.

23 Q. What's the ballpark number?

24 A. I really don't remember.

25 Q. Was it over a million?

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Cross - Torchio

1 A. I can't remember.

2 Q. OK. Let's just -- I don't know it. Sitting right near,  
3 let's assume it is \$500,000. OK?

4 A. OK.

5 Q. If one expense for \$675,000 was taken off above that line,  
6 that would increase EBITDA to a \$1,575,000, correct?

7 A. Yes.

8 Q. And at that point, the multiple that you found would be  
9 approximately half or a little bit more?

10 A. Sure.

11 Q. OK. Have you looked into how that would stack up against  
12 the S&P 500?

13 A. No, I didn't. I don't think that that is the correct way  
14 of doing the analysis.

15 Q. You mentioned that you considered Andy Eder's testimony on  
16 different things, this is the principal of Eder-Goodman,  
17 correct?

18 A. Correct.

19 Q. And did you consider his testimony about the offer that he  
20 has made to buy Eber-Connecticut?

21 A. The current offer as of today?

22 Q. Yes.

23 A. No, I didn't. I didn't analyze that. I mean, other than  
24 what I did for Mr. Liebman's valuation, I didn't do any work on  
25 current valuations.

L9MsKLE2

Cross - Torchio

1 Q. Is it your opinion as an expert that a bona fide offer from  
2 an interested third party who is aware of the business should  
3 be considered when determining how to value that business?

4 A. As of today?

5 Q. Yes.

6 A. Sure.

7 Q. Would you agree that it is important when trying to pick a  
8 comparable company to look at what the earnings trends are for  
9 that company?

10 A. I'm OK with that, yes.

11 Q. In fact, that is something that is specified by Revenue  
12 Rule 59-60, is it not?

13 A. I don't recollect.

14 Q. Do you -- you are familiar with Revenue Rule 59-60,  
15 correct?

16 A. I am.

17 Q. And that's an important part of any business value -- any  
18 person who is valuing a privately held business, that their  
19 repertoire of information to rely on, correct?

20 A. Well, the analysis ought to include the expected growth in  
21 the comparable company whether there is reason to believe that  
22 the expected growth and riskiness of that -- of those companies  
23 are the same. That's the basic tenet.

24 Q. Let's take a look at part of Revenue Rule 59-60. It is  
25 Exhibit 596.

L9MsKLE2

Cross - Torchio

1           Specifically, let's go to Section 4H at pages four to  
2 five of the exhibit, Ali. And if you can actually go to page  
3 five, I want to focus on the last sentence of Section H. So  
4 you can blow up the last part of the highlighted section, just  
5 blow up the highlighted section. Thank you.

6           All right. Last sentence here says, A company with a  
7 declining business and decreasing market is not comparable to  
8 one of a record of current progress and market expansion.

9           Do you see that?

10          A. Yes.

11          Q. Do you agree with that?

12          A. Generally.

13          Q. All right. You can take that down.

14                 Now, another thing you said in your direct  
15 testimony -- and this is an approximate quote -- is that no  
16 where does the literature say that companies have to sell the  
17 same products, is that fair?

18          A. That's fair.

19          Q. But the literature does say that you should use multiple  
20 data points when using comparable companies, correct?

21          A. If available, sure.

22          Q. And that is, in fact, a significant point that is made by  
23 Shannon Pratt, one of the leading authors in this field,  
24 correct?

25          A. Yes. To expand the amount of data points that you have,

L9MsKLE2

Cross - Torchio

1 you expand the criteria to include them.

2 Q. And would you also agree that if you did not have  
3 multiple -- if a very few data points are available, that might  
4 be a reason to reject a comparable company analysis entirely?

5 A. No, I wouldn't. In fact, quite the opposite. I think that  
6 it's important to provide some aspect. I mean, I'm sure that  
7 had I included companies that were less similar than Farmers or  
8 Prospect that would also be objected to.

9 So I tried to find companies that at least had some,  
10 you know, substantial similarities, that would allow me to use  
11 them and not -- and not provide ammunition to tear it down and  
12 throw the baby out with the bath water.

13 Again, to assign zero weight to something that is,  
14 in my view, would be relevant to an investor, I think is  
15 incorrect.

16 THE COURT: Just pause there for a minute. I think a  
17 word was missed in the transcript in the answer to the last  
18 question.

19 What I heard in the fourth sentence was the witness  
20 say the following: "I mean, I'm sure that had I included" --

21 No, I'm sorry. I'm reading the wrong sentence.

22 So I tried to find companies that at least had some,  
23 you know, substantial similarity and so forth. And the word  
24 "some" is not in the realtime transcript.

25 Does everybody agree that's what he said?



L9MsKLE2

Cross - Torchio

1 MR. BROOK: I have no reason to disagree.

2 MR. MULRY: No, your Honor.

3 MR. BROOK: Perhaps the witness --

4 MR. MULRY: Perhaps we'll ask the question.

5 THE COURT: You said "some" and then you --

6 THE WITNESS: Possibly.

7 THE COURT: That's what I heard. If there is no  
8 objection, the transcript will be corrected in that regard.

9 I hear no objection.

10 BY MR. BROOK:

11 Q. All right. You wouldn't put zero weight on the fact that  
12 there is only one or two available data points, correct?

13 A. I would not.

14 Q. But wouldn't it be fair to give it relatively little weight  
15 if there are few data points available?

16 A. Well, if it was -- I mean, I do have five metrics that I'm  
17 using and trying to rate them.

18 Q. I'm focusing specifically on the comparable transaction  
19 metric involving different companies.

20 A. I understand. But I think it has to be taken in context of  
21 what the valuation exercise is that includes five metrics. If  
22 there were two, perhaps. But to me, I think that it's  
23 necessary to include that. If 20 percent weight is, in the  
24 judge's opinion, too high, fine. Lower it. But to go to zero,  
25 I think, is -- is incorrect. It is just not in keeping with

L9MsKLE2

Cross - Torchio

1 what an investor would want to look at.

2 THE COURT: You used on your earlier testimony a  
3 reference to the Delaware block method. Just so I'm sure  
4 you're talking about what I understand that to be, tell me what  
5 you understand that to be.

6 THE WITNESS: So in Delaware, when you've got a number  
7 of different valuation metrics, like DCF analysis and  
8 comparable trading multiple analysis, transaction multiple  
9 analysis, maybe even adjusted book value analysis, that there's  
10 weights assigned to those various measures to come up with a  
11 point estimate.

12 THE COURT: And that's by virtue of case law, right?

13 THE WITNESS: Yes.

14 THE COURT: And it applies in the Delaware Chancery  
15 Court and the Delaware Supreme Court in certain types of cases,  
16 right?

17 THE WITNESS: I know it applies in appraisal cases,  
18 your Honor.

19 THE COURT: In what?

20 THE WITNESS: Appraisal.

21 THE COURT: Appraisal, yes.

22 Well, I'll leave it to others, the question of the law  
23 of New York.

24 There are other methods used in other states in  
25 appraisal proceedings, are there not?

L9MsKLE2

Cross - Torchio

1 THE WITNESS: I would assume so, yes.

2 THE COURT: OK. Let's go.

3 BY MR. BROOK:

4 Q. All right. Let's just make sure I'm understanding you  
5 correctly and see if --

6 Let's put up Exhibit 305, page five. This is an  
7 excerpt --

8 Actually, let's first show page one.

9 Do you recognize this book?

10 A. Yes.

11 Q. This is the fifth edition of the Shannon Pratt treatise  
12 which you yourself have relied upon, correct?

13 THE COURT: Let's not do this. All right?

14 MR. BROOK: Yes, your Honor. Force of habit.

15 THE COURT: It is finite.

16 Q. Were a number of data points available -- we won't read a  
17 whole thing. It says, If it turns out that very few data  
18 points are available for a particular valuation multiple, that  
19 problem may lead one to abandon that multiple or to put  
20 relatively little weight on it. This is true even though it  
21 might be quite conceptually significant if there were more  
22 data.

23 Do you see that?

24 A. Yes.

25 Q. And do you agree with that?

L9MsKLE2

Cross - Torchio

1 A. I think that's a valid point.

2 Q. OK. You can take that down, Ali.

3 Let's talk about some of the multiples that you have  
4 used. One is Prospect Beverages --

5 A. Yes.

6 Q. -- correct?

7 And that is a transaction that occurred in 2001,  
8 right?

9 A. It is.

10 Q. More than ten years before the valuation date you're  
11 looking at, correct?

12 A. Yes.

13 Q. And that amount of time is a factor that reduces its  
14 reliability, correct?

15 The amount of time between the transaction that you're  
16 comparing and the transaction that you're valuing, that  
17 matters, doesn't it?

18 A. Yes.

19 Q. And you said that in your testimony, correct?

20 A. Yes, yes.

21 Q. But, otherwise, you think that this is one of the tightest  
22 comparisons you have ever found in your career, is that right?

23 A. I do, yes.

24 Q. All right. What was Prospect Beverages selling?

25 A. My recollection is they were selling Pabst beer and Colt 45

L9MsKLE2

Cross - Torchio

1 malt liquor.

2 Q. In fact, they were only selling malt liquor, isn't that  
3 right?

4 A. I thought they were selling Pabst beer too.

5 Q. Do you know who the manufacturer of Colt 45 malt liquor is?  
6 Pabst.

7 A. OK.

8 Q. They also sold Olde English 800, does that sound right?

9 A. I don't remember.

10 Q. Do you know what kind of liquor or alcohol that is?

11 A. I do not.

12 Q. When is the last time you saw a malt liquor on a menu in a  
13 nice restaurant?

14 A. I don't drink malt liquor. I wouldn't be looking at it.

15 Q. But you do drink wine?

16 A. A little bit.

17 Q. All right. And did you do any research to see whether or  
18 not the types of customers and distributors are generally the  
19 same for any companies with respect to malt liquor on the one  
20 hand and Eber Wine & Liquor on the other?

21 A. I did not.

22 Q. Did you look into what the sales trends were like for Pabst  
23 products at the time of the transaction in 2001?

24 A. No, I did not.

25 Q. Do you occasionally use Google to try to research these

L9MsKLE2

Cross - Torchio

1 things about a company?

2 A. Occasionally.

3 Q. And you didn't do that in this instance?

4 A. No.

5 Q. Even though you only had a few data points, you didn't do  
6 much of a deep dive into what Prospect Beverages was selling,  
7 is that correct?

8 A. Correct.

9 Q. Let's put up Exhibit 307.

10 Do you not have it?

11 MS. KRAL: One moment. One second. It will be up in  
12 just a second.

13 MR. BROOK: One moment, please. It's coming.

14 MS. KRAL: There you go.

15 Q. Now, have you ever heard of Quartz website?

16 A. I have not.

17 Q. OK. I want to just look at -- I'll represent that this is  
18 an article that can be found through Google.

19 Second paragraph, if you can blow that up, Ali.

20 This says, The past decade has been an incredible one  
21 for the brewery -- and this is an article dated in 2014 -- and  
22 especially for its namesake beer. The pale fizzy lager was  
23 popular in the 1970s, but lost its way in the 1980s and 1990s,  
24 hitting a low in 2001, when PBR sales dipped beneath a million  
25 barrels.

L9MsKLE2

Cross - Torchio

1 I'll stop it there. So that's talking about Pabst  
2 Blue Ribbon, which it's your understanding is a beer that was  
3 sold by Prospect?

4 A. Right.

5 MR. MULRY: Your Honor, just object to this exhibit on  
6 the grounds of hearsay.

7 THE COURT: I hear you.

8 MR. BROOK: Does that mean it's sustained, your Honor?

9 THE COURT: It means go on.

10 MR. BROOK: OK.

11 You can take that down, Ali.

12 MR. MULRY: Your Honor, I believe these are new  
13 exhibits for cross-examination that we are seeing for the first  
14 time. These are our objections. They would not have been made  
15 already.

16 THE COURT: I appreciate that.

17 MR. BROOK: We're not offering it into evidence.

18 THE COURT: It all went bad for Pabst when they got  
19 rid of Burton Ale, but you're all too young to know what that  
20 means.

21 MR. BROOK: Yes, your Honor, that is true.

22 BY MR. BROOK:

23 Q. In 2001, what that just said was, the low point for Pabst's  
24 most possible similar beer, the blue ribbon band, that was the  
25 date of the Prospect transaction, correct?

L9MsKLE2

Cross - Torchio

1 A. It was.

2 Q. Let's talk about Farmer Brothers.

3 Unlike Prospect, which was a transaction-based  
4 multiple, this is one where you pull the multiple from the  
5 public stock market, correct?

6 A. Correct.

7 Q. And you characterize it as a tea company, but did you  
8 actually look into what the company does?

9 A. Well, they distribute coffee and tea. I think they provide  
10 some coffee products.

11 Q. They are, in fact, a coffee roaster themselves independent,  
12 correct?

13 A. I think they do some blending of coffee. I'm not sure if  
14 they do roasting.

15 Q. To your knowledge, they don't actually distribute a variety  
16 of different brands from suppliers, correct?

17 A. I don't know that to be true.

18 Q. Because you didn't research it, correct?

19 A. I didn't look to see whether -- all the suppliers they had.

20 Q. So when someone -- withdrawn.

21 For Eber-Connecticut, you understood that they sold  
22 hundreds, perhaps thousands, of different labels of wine and  
23 liquor, correct?

24 A. Correct.

25 Q. And from a variety of different suppliers to cater to a



L9MsKLE2

Cross - Torchio

1 variety of different tastes, correct?

2 A. You mean the end customers, the individuals?

3 Q. Yes, the end customers.

4 A. Sure.

5 Q. But if a company like Farmer Brothers is only selling its  
6 own coffees, someone doesn't like their coffee, that is not a  
7 potential customer; they can't just switch to a different  
8 roaster, correct?

9 A. I suppose so, yeah.

10 Q. In being publicly traded, there is no control premium in  
11 buying a share on the stock market of Farmer Brothers, is  
12 there?

13 A. Well, I can't agree with that.

14 Q. If I bought one share of Microsoft, would I be paying a  
15 control premium for that on the stock market in your view?

16 A. That depends.

17 Q. On how many shares I already have?

18 A. No, no. It depends -- I mean, a control premium, as I have  
19 said, is dictated by how some investors could possibly take  
20 that company and increase its value. If that company is fully  
21 valued, then there is no control premium that can be expected.  
22 In fact, if you look at some of the recent opinions that have  
23 come out of the Delaware Chancery Court, that is exactly what  
24 they are saying. In many cases, the fair value is the publicly  
25 traded price. So that for many companies, there is no

L9MsKLE2

Cross - Torchio

1 potential control premium.

2 And, in fact, you know, if you think about this  
3 logically, if every company had an inherent control premium,  
4 you would see a lot more takeover proposals than you do. The  
5 reason that you don't is because there is no value-enhancing  
6 strategy that is going to increase the value for most companies  
7 on the stock exchange to warrant or justify a control premium.

8 Q. So did you, as part of your analysis of Farmer Brothers,  
9 look at --

10 THE COURT: So are we now getting Mr. Torchio as an  
11 expert on Delaware law, is that the idea?

12 MR. BROOK: Your Honor, I've not objected on the  
13 assumption the court can differentiate between legal and --

14 THE COURT: Yeah, I think I can manage.

15 BY MR. BROOK:

16 Q. So in looking at Prospect's -- I'm sorry -- Farmer  
17 Brothers, did you examine whether the publicly traded stock  
18 price incorporated any kind of control premium?

19 A. I think that you probably misunderstood my answer then if  
20 you're asking this question.

21 Q. I probably did, I guess. I'll withdraw the question then.

22 Just talking about, you know, you criticize Glenn  
23 Liebman for putting zero weight on the multiples of Prospect  
24 and Farmer Brothers, correct?

25 A. Yes.

L9MsKLE2

Cross - Torchio

1 Q. Because he rejected those as invalid comparable methods,  
2 correct?

3 A. He did.

4 Q. And you put equal weight on those comparable methods with  
5 something like the Eder-Goodman purchase of 15 percent,  
6 correct?

7 A. To be specific, I put 20 percent weight on each.

8 Q. OK. So in your view, and this is your honest opinion, the  
9 transaction for Prospect Beverages in 2001, a seller of malt  
10 liquor in Brooklyn, is an equal measure of value for  
11 Eber-Connecticut as a transaction involving the sale of  
12 Eber-Connecticut's stock to another wine and liquor distributor  
13 in 2008?

14 A. With the caveat that the problem with those actual  
15 transactions have to do with valuing the ROFR value --

16 Q. Is that a yes, you agreed?

17 A. With the caveat I do --

18 Q. Again, you're just nodding. I am just trying to confirm  
19 you're saying yes. I'll let you finish your caveat. Don't  
20 worry.

21 A. I do think that is equivalent because the transactions that  
22 you're referring to have a difficulty in assessing what is the  
23 true value of the equity because they contain so many different  
24 rights.

25 So yes, I would place equal value on them as sitting

L9MsKLE2

Cross - Torchio

1 here today. 20 percent weight, as I said before.

2 Q. And your opinion is that, therefore -- let me step back.

3 Using Prospect Beverages, you value the company at a  
4 little over \$600,000 as of 2012, correct?

5 A. Let me look at my table.

6 Q. All right. I think there may be an exhibit -- we're not  
7 offering it as this -- I know it is Plaintiffs' Exhibit 129, if  
8 we want to put it up on the screen.

9 I'm sorry. I'm going to take that back. Last page of  
10 this. Last page of this.

11 A. It's C-4, if that helps.

12 Q. Yes, very last page. This is where we see everything.

13 A. OK. OK.

14 Q. Then on the far right, we see \$646,413 as the value of what  
15 you see as Eber-Metro's ownership interest, correct?

16 A. Correct.

17 Q. And then under the Eder-Goodman 2008 transaction, it is  
18 \$10,718 -- I'm sorry -- \$10,718,000, correct?

19 A. Under -- say it again.

20 Q. Eder-Goodman 2008 valuation in the middle.

21 A. In the Eder-Goodman?

22 Q. Yes.

23 A. Yes.

24 Q. So that's just looking at 79 percent of the company's total  
25 equity after giving preference to 4.5 million, correct?

L9MsKLE2

Cross - Torchio

1 A. Correct.

2 Q. So would you agree that that's a pretty widespread in  
3 valuation between the two different data points?

4 A. Yes.

5 Q. I mean, it's a factor of more than 13 or 14, correct?

6 A. Yes.

7 Q. And that didn't cause you to question whether you should  
8 give more or less weight to one of those over the other?

9 A. Well, what I did when I saw Mr. Eder's testimony is, I'm  
10 thinking that I undervalued that -- that preference, right.

11 So, you know, you can look at it both ways, I suppose. And I'm  
12 trying to give equal weight to those two things to come up with  
13 some kind of value.

14 But as I said in my deposition, there is difficulties  
15 with each of these, and to just gloss over those other  
16 valuations, what I would term to be very pertinent rate  
17 valuations, I think is -- is incorrect. So is the error in  
18 Prospect Beverages or is the error in undervaluing the rights  
19 that Eder-Goodman got.

20 Q. Let's talk about another one of these transactions. And we  
21 can flip to -- keep this up, Ali -- I think it is page three of  
22 this exhibit.

23 So this is your exhibit, what was marked in your  
24 deposition as C-2, for the Southern Wine & Spirits offer,  
25 correct?

L9MsKLE2

Cross - Torchio

1 A. Yes.

2 Q. OK. On this one, there was no liquidation preference, only  
3 a right of first refusal, correct?

4 A. That's correct.

5 Q. You value that right of first refusal at \$391,000 and  
6 change and, therefore, subtracted that from the offer price,  
7 correct?

8 A. That's correct.

9 Q. Is it fair to say that as a general matter in your  
10 testimony, you received instructions from defense counsel on  
11 what to do, such as how to treat liabilities of Eber Wine &  
12 Liquor?

13 A. Liabilities outside of the valuation?

14 Q. Yes. Just generally you received information and  
15 instructions from defense counsel?

16 A. Yes.

17 Q. Did they tell you about the separate transaction for right  
18 of first refusal with Southern Wine & Spirits?

19 A. I do have a recollection of a ROFR that Southern had.

20 Q. All right. Let's put it up. It's Defense Exhibit FFFF.

21 Could you blow up, I guess, everything from below  
22 Mr. Hager, please? Perfect.

23 Does this document look familiar to you?

24 A. No.

25 Q. OK. Let's look at the paragraph one.

L9MsKLE2

Cross - Torchio

1           It says, Southern shall pay Metro the amount of  
2 \$100,000 in exchange for Metro granting the purchase right to  
3 Southern. Southern shall pay Metro the purchase price and  
4 immediately available funds upon execution of the agreement by  
5 both parties hereto.

6           I would represent that the second -- that the third  
7 and fourth pages show the signatures of both parties thereto.

8           Does this affect your valuation of how much that right  
9 of first refusal was worth to Southern Wine & Spirits?

10          A. Can I read the whole document?

11                I've never seen this before.

12          Q. Sure. I think I have a copy without too much notes on it.

13                MR. BROOK: Your Honor, may I hand it to the witness?

14                THE COURT: Yes.

15                MR. BROOK: Perhaps, actually, your Honor, maybe now  
16 would be a good time to take a break so he can look at this.

17                THE COURT: OK.

18                (Recess)

19                (Continued on next page)

L9m2Kle3

Torchio - Cross

1 BY MR. BROOK:

2 Q. Have you had a chance to review that document?

3 A. Yes, I have.

4 Q. And is it still your recollection that you have not seen  
5 this document before?

6 A. No, I have not.

7 Q. Okay. And having looked at this now, seeing that there was  
8 a separate contract for the Southern right of first refusal,  
9 does that affect your opinion on the valuation of the right of  
10 first refusal in the Southern offer?

11 A. Well, subject to looking at this letter agreement on July  
12 5, I would say, yeah, I think that I would certainly factor  
13 this letter into my analysis.

14 Q. And would it be fair to say that if an extra \$100,000 was  
15 paid in a separate transaction, the total transaction value  
16 would also have to go up from 3 million to 3.1 million? Well,  
17 the offer was to buy Eber-Connecticut, 15 percent of it, for \$3  
18 million, correct.

19 A. Yes.

20 Q. So if there was already a transaction where a right of  
21 first refusal was bought for \$100,000, then the total  
22 transaction value for the right of first refusal and the 15  
23 percent would be 3.1 million, or do you disagree with that  
24 math?

25 A. Yeah, I don't understand that. If the total purchase price



L9m2Kle3

Torchio - Cross

1 is 3 million and that purchase price contains a right of first  
2 refusal, then the analysis, I mean, if you look at my page C2,  
3 you would subtract the premium for that right from the 3  
4 million and get 2.9 million instead of 2.6 million.

5 THE COURT: But there is a separate \$100,000 changing  
6 hands for the right of first refusal.

7 THE WITNESS: Well, but this is not the same offer, is  
8 it not?

9 THE COURT: Well, that's a very interesting question,  
10 isn't it?

11 THE WITNESS: I guess I would have to see what the  
12 letter is because I assume that the one, the 100,000 is part of  
13 the total price.

14 THE COURT: Well, why would you assume that? It says,  
15 "Southern shall pay Metro the purchase price in the immediately  
16 available funds upon the execution of this agreement by both  
17 parties."

18 THE WITNESS: Okay.

19 MR. BROOK: All right.

20 THE COURT: So if you regard this as part of the same  
21 transaction, it is three million one.

22 THE WITNESS: Yes, if this letter is completely  
23 separate from the three million. I just don't know.

24 MR. BROOK: Maybe I just note the exhibit numbers for  
25 the record for the Court to reference later? The Court can

L9m2Kle3

Torchio - Cross

1 look at Exhibit 194 at page 5, which is a transaction closing  
2 binder that references this agreement at number 13, and it can  
3 also look at Exhibit 198, which is a letter dated January 29,  
4 2008, in which Southern agreed to terminate the right of first  
5 refusal to allow the Eder-Goodman transaction to go through.

6 THE COURT: Okay. Now would you put up Plaintiff's  
7 194, page 5.

8 MR. BROOK: Sure. Let's do that. That is item 13  
9 there, a little more than halfway down.

10 THE COURT: Okay. Don't highlight that. It's  
11 blocking the screen. Back up to the first page now, please.

12 Can you hold it still?

13 PARALEGAL: I'm not touching it.

14 THE COURT: Go to the next page, please.

15 Next page, please.

16 Next page, please.

17 Next page, please.

18 Next page, please.

19 Next page, please.

20 Thank you.

21 Now, what is the exhibit number of the employment  
22 agreement between Southern and Lester Eber?

23 MR. BROOK: I want to say it is 27 off the top of my  
24 head, but I can check that. Yes.

25 THE COURT: Could we put Exhibit 27 on the screen?

L9m2Kle3

Torchio - Cross

1 MR. BROOK: It's on the screen, your Honor.

2 THE COURT: Have you ever seen that before,  
3 Mr. Torchio.

4 THE WITNESS: The consulting agreement, your Honor?

5 THE COURT: Yes.

6 THE WITNESS: No, I did not.

7 THE COURT: Were you ever informed of it?

8 THE WITNESS: I -- yes, I was informed that there was  
9 a consulting agreement.

10 THE COURT: And what were you told about it.

11 THE WITNESS: I was told that when Southern took over  
12 New York, that Lester received an agreement to be a lobbyist, I  
13 believe, on behalf of Southern in New York State.

14 THE COURT: Were you told that he was to be paid \$3  
15 million over five years?

16 THE WITNESS: I don't remember the amount, but I was  
17 told that he was paid for three years.

18 THE COURT: For five years, right?

19 THE WITNESS: Was it five years? Okay.

20 THE COURT: Now, if and to whatever extent the money  
21 payable to Lester under the consulting agreement were treated  
22 as part of the purchase price, that would have quite an impact  
23 on your valuation, wouldn't it?

24 THE WITNESS: Absolutely.

25 THE COURT: What would it do to your valuation?

L9m2Kle3

Torchio - Cross

1 THE WITNESS: Well, it would certainly increase the  
2 valuation, if that was -- if that consulting agreement was part  
3 of the proceeds, absolutely.

4 THE COURT: Perhaps by as much as double, true?

5 THE WITNESS: That's correct.

6 THE COURT: Let's go on. Thank you.

7 BY MR. BROOK:

8 Q. All right. Let's move on.

9 Let's talk about Eder-Goodman a little bit more. And  
10 you reviewed all the testimony that Eder -- Andy Eder gave last  
11 week, is that right?

12 A. Yes.

13 Q. So you saw that in fact the way that Eder-Goodman valued  
14 the transaction in 2008 was based on gross profit, correct?

15 A. I saw that that was -- when they were -- I believe the  
16 document you are referring to is where they were thinking about  
17 buying the whole company.

18 Q. And you saw that he said that his offer to buy the whole  
19 company in late 2007 early 2008 was for approximately \$20  
20 million plus the net asset value, correct?

21 A. I believe that that's correct.

22 Q. And have you done any work to try to calculate what that  
23 net asset value would have been at that time?

24 A. Using -- well, it would include the control premium you are  
25 talking about.

L9m2Kle3

Torchio - Cross

1 Q. I am talking about just the numbers that he gave for buying  
2 all of Eber-Connecticut. Do you have any ballpark sense, even  
3 as to what number it was that Andy Eder was saying he would  
4 have paid for Eber-Connecticut all 100 percent of it in 2007 or  
5 '8?

6 A. Well, my recollection was that he couldn't remember what  
7 the actual multiple was. I think I saw on page -- the first  
8 page was like a multiple of one times gross profit, and then on  
9 the third page I believe --

10 Q. So is it fair to say that you have not attempted to  
11 calculate a number based upon Andy Eder's testimony as far as  
12 what he offered?

13 A. Well, I did --

14 Q. That's all I am asking.

15 A. I did look at page one, and that looked like it was in the  
16 ballpark of what I was talking about.

17 Q. Is it you are talking about page one of his -- was it  
18 Exhibit 199?

19 A. Yes, yes.

20 Q. The part that has at the top the numbers for -- so you did  
21 notice that actually the different columns here are labeled ASG  
22 and Eder?

23 A. Yes, I saw that.

24 Q. So did you recognize that that's referring to their  
25 existing companies, Alan S. Goodman and Eder Brothers, not

L9m2Kle3

Torchio - Cross

1 Eber-Connecticut?

2 A. That they were combining the companies.

3 Q. Right, but what do you think that relevance has to the  
4 value of Eber-Connecticut?

5 A. Well, they were considering whether there would be any  
6 synergies that could be attained from combining the companies.  
7 That's my take on that.

8 Q. Okay. But this is not something that reflects their  
9 valuation of Eber-Connecticut because it's not  
10 Eber-Connecticut's financial information there?

11 A. Well, the revenue on top I believe is awfully close to what  
12 Eber-Connecticut's revenue was, and I believe that gross profit  
13 margin, the percentage, I think that's pretty close, too. And  
14 so the good will multiple that they are using is a multiple of  
15 one.

16 Q. Okay. And have you tried to use this document to try to  
17 see what number you think it reflects for Eber-Connecticut's  
18 value?

19 A. Well --

20 Q. I'm not asking you to do --

21 A. I think I did. If I just go to -- give me a second here.

22 MR. BROOK: Your Honor, I would like to withdraw the  
23 question.

24 THE COURT: Okay.

25 BY MR. BROOK:

L9m2Kle3

Torchio - Cross

1 Q. You focused a lot of your testimony on the different rights  
2 that were afforded to Eder-Goodman under the LLC agreement,  
3 fair?

4 A. Yes.

5 Q. Including the right of first refusal and preemptive rights  
6 and liquidation preferences, etc., correct?

7 A. Yes.

8 Q. Isn't it true that there were also some restrictions on  
9 their rights that were carried with that LLC agreement, as  
10 well?

11 A. Well, there were some restrictions. I know that there was  
12 a nonsolicitation, kind of a joint nonsolicitation clause about  
13 suppliers, suppliers that Eder had, suppliers that Eber had.  
14 That I do recall.

15 Q. Okay. Well, let me ask you this: Is it fair to say that  
16 the reason why a right of first refusal diminishes the value of  
17 remaining equity is because it reduces the alienability of that  
18 property, the marketability of it?

19 A. Well, I suppose you could think of it that way. I think it  
20 deters potential buyers from even considering approaching or  
21 providing an offer.

22 Q. Right. And so that would explain why -- withdrawn.

23 THE COURT: Excuse me. But, Mr. Torchio, that depends  
24 on who has the right of first refusal, where they are in  
25 business at the time the right might be triggered, what their

L9m2Kle3

Torchio - Cross

1 ability to finance the exercise of the right is, and probably  
2 other factors that just haven't occurred to me yet, right?

3 THE WITNESS: Of course.

4 THE COURT: If the holder of right of first refusal is  
5 insolvent, a prospective buyer can pretty much figure that it's  
6 not going to be exercised, true?

7 THE WITNESS: Fair enough.

8 THE COURT: And if the property in respect of which  
9 the right of first refusal is of unique or specialized value to  
10 the prospective buyer, that prospective buyer may be able to  
11 offer a price that no rational holder of the right of first  
12 refusal would match, true?

13 THE WITNESS: Well, considering the other rights that  
14 they have, I think that would be difficult to justify a kind of  
15 premium.

16 THE COURT: I'm not talking about the other rights. I  
17 am talking about my question.

18 THE WITNESS: Well --

19 THE COURT: Suppose we had another bidder who had an  
20 empty warehouse and 15 unionized truck drivers with trucks whom  
21 he can't lay off for some reason and could absorb Eber Brothers  
22 Connecticut, for the sake of argument, without any material  
23 increase in his cost structure.

24 THE WITNESS: Yeah, if -- if your Honor is assuming  
25 that, number one, Eder-Goodman wouldn't exercise its right of



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Torchio - Cross

1 first refusal because of financial reasons and, number two,  
2 that the buyer would not consider or would think that  
3 Eder-Goodman's other rights are irrelevant, then, yeah, you can  
4 imagine that there would be synergies they could combine these  
5 companies together and attain the increase in value that I am  
6 referring to. But the facts and circumstances here don't seem  
7 to jive with that.

8 THE COURT: But my questions were not addressed to the  
9 facts and circumstances.

10 THE WITNESS: Oh.

11 THE COURT: Here, they were addressed to the  
12 hypotheticals I put to you. I know you are advocating, and I  
13 understand that's what experts do often, but --

14 THE WITNESS: Honestly, your Honor, I'm not trying to  
15 advocate at all. I am trying to be objective.

16 THE COURT: I accept your assertion. Let's go.

17 MR. BROOK: Your Honor has partially preempted my next  
18 hypothetical I was going to get to, but I think it is important  
19 anyway.

20 THE COURT: Well, I would like to get to the point.

21 BY MR. BROOK:

22 Q. There were drag-along rights also associated with this  
23 agreement, right?

24 A. Yes.

25 Q. And those are a negative for the person who has -- who is

L9m2Kle3

Torchio - Cross

1 subject to the drag-along rights, correct?

2 A. Yes.

3 Q. So in this case, the drag-along rights mean they can be  
4 forced to sell something less than fair market value, correct?

5 A. Correct.

6 Q. So assume that the company expands, does really well, and  
7 ten years down the line you yourself value it at \$100 million.  
8 Are you with me so far?

9 A. Uh-huh.

10 Q. And at the same time, Eder-Goodman goes in the opposite  
11 direction and becomes insolvent. You follow me?

12 A. Yes.

13 Q. So it cannot afford to exercise its right of first refusal  
14 for any amount of money, correct?

15 A. Right.

16 Q. At that point Eber-Connecticut could decide to sell the  
17 company for \$10 million, I don't know, maybe to a family  
18 member, and Eder-Goodman only gets \$4.5 million, even though  
19 you yourself would value its equity at \$15 million, correct?

20 A. I think that that's a fair reading, yes.

21 Q. And isn't it true that there are also -- there is an actual  
22 restriction on disposition, that there cannot be a sale without  
23 the consent of the Eber-Metro majority owners?

24 A. I think it has to be unanimous.

25 Q. Yeah, so, Eder-Goodman is buying something that it can't

L9m2Kle3

Torchio - Cross

1 get rid of without the consent of the majority owner, fair?

2 A. That's right.

3 Q. And you didn't make any sort of discount for that, did  
4 you?

5 A. Well, I wouldn't say that. I think I looked at all of the  
6 rights that were available and I thought 15 percent was a very  
7 conservative estimate considering everything.

8 Q. All right. Last topic.

9 As part of your analysis, you conclude about -- you  
10 make conclusions about the solvency of Eber Wine & Liquor and  
11 Eber-Metro, correct?

12 A. Yes, sir.

13 Q. And that was based in substantial part on an instruction  
14 you received from counsel about how to treat those liabilities  
15 of Eber Brothers Wine & Liquor, correct?

16 A. That's correct.

17 Q. And but during your deposition you indicated it was also  
18 your opinion that a reasonable investor aware of all the facts  
19 would nonetheless agree that those liabilities would follow  
20 Eber-Metro and Eber-Connecticut after any transaction. Is that  
21 a fair characterization of your testimony?

22 A. Yes, that -- the legal determination that I have been given  
23 had it been provided to an investor with regard to the  
24 magnitude of these liabilities and that they were joint and  
25 several liabilities with a high degree of certainty that that

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Torchio - Cross

1 information would be highly relevant to an investor.

2 Q. And that's because in your view an investor aware of all  
3 the facts would see Alexbay's acquisition of Eber-Metro as a  
4 fraudulent conveyance, correct?

5 A. Well, in -- what I was talking about in my deposition was a  
6 situation -- at least in my mind, was a situation where you  
7 sell the company, you sell -- effectively you are selling  
8 Eber-Connecticut and the cash proceeds are distributed, but the  
9 liabilities remain with Metro and then, in my view, from my  
10 experience with working for the PBGC, the PBGC would go after  
11 it, and I think the term that they use is we follow the assets,  
12 we are not going to let that occur. So that was my discussion  
13 in the deposition.

14 Q. And so --

15 THE COURT: So, excuse me, is that a "yes"?

16 THE WITNESS: That's a "yes."

17 THE COURT: Thank you.

18 BY MR. BROOK:

19 Q. And in your deposition you also said that an investor aware  
20 of all the facts would recognize the transaction as a shell  
21 game, correct?

22 A. If you tried to sell the assets and leave the liabilities  
23 with a company that has no assets, then yes.

24 Q. But just to be clear, that's based on the purchase price  
25 that was paid, correct?

L9m2Kle3

Torchio - Cross

1 A. I'm not sure I follow you.

2 Q. All right. It is not the world we live in where every time  
3 a subsidiary is sold the company buying the subsidiary has to  
4 be afraid of the parent's pension plan, is it?

5 A. Well, I don't know that I agree with that. I think that  
6 one of the concerns of an investor, particularly an investor  
7 who has deep pockets, is that -- is that there is -- the  
8 pension liability is going to come back to haunt them, whether  
9 they are assuming them or not. So I'm not sure that I can  
10 completely agree with your contention.

11 Q. Well, I'm not asking if it's one of the concerns. I'm  
12 asking if it is something that, in your view, is essentially a  
13 certainty? Because that's the position you are taking is that  
14 this is an amount of money that should be counted at full value  
15 and not discounted based upon any probabilities, correct?

16 A. Well, given the assumptions about the liabilities that I  
17 have been provided with, I don't see how one would legitimately  
18 come up with a probability. It seems like, from what my  
19 instructions are, that those liabilities, both the amounts and  
20 the degree of certainty, were so high that there would be no  
21 probabilistic analysis required.

22 Q. Let me give you a hypothetical that I think will end this,  
23 and hopefully you don't disagree with me just because I  
24 paraphrase it that way.

25 Let's assume that Eber-Metro has -- that Eber Wine &

L9m2Kle3

Torchio - Cross

1 Liquor has liabilities of \$10 million even. With me so far?

2 A. 10 million even.

3 Q. All right. And someone offers to buy Eber-Metro and all of  
4 its assets for \$20 million but without assuming any liabilities  
5 of Eber Wine & Liquor. You follow me?

6 A. Got it.

7 Q. So in your view, would the buyer be assuming the  
8 liabilities of Eber Wine & Liquor in that purchase?

9 A. So long as that \$20 million was not distributed to the unit  
10 holders and it was used to pay off the liabilities, I agree  
11 with you. To the -- what I was talking about is to the extent  
12 that the cash is distributed and the liabilities are sitting  
13 there naked, then I could see that the PBGC going after the  
14 buyer.

15 Q. So in other words, it really depends on the trustworthiness  
16 and honorability of the parent's management as to whether or  
17 not they will properly prioritize creditors over themselves?

18 A. I think that's exactly what I am saying, but I am just  
19 saying if it was distributed without considering -- without  
20 paying off the liabilities, then I think they would go after  
21 the buyer.

22 MR. BROOK: No further questions.

23 THE COURT: Thank you.

24 Any redirect?

25 MR. MULRY: If I could just have a moment.

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Torchio - Redirect

1 THE COURT: Yes.

2 (Counsel confer)

3 THE COURT: Counselor.

4 REDIRECT EXAMINATION

5 BY MR. MULRY:

6 Q. Mr. Torchio, just a few questions on the last point with  
7 respect to your understanding of the PBGC liabilities.

8 Looking at -- you were valuing primarily Metro, is  
9 that correct?

10 A. Yes.

11 Q. And what's your understanding of what was your belief as to  
12 what a buyer of Metro would be concerned about with respect to  
13 any pension liabilities?

14 MR. BROOK: Objection, your Honor. It's asked and  
15 answered in all the direct testimony that was submitted.

16 THE COURT: I will listen. Go ahead.

17 BY MR. MULRY:

18 Q. Just to clarify your last questions to Mr. Brook, maybe I  
19 will rephrase it a different way.

20 Why would a purchaser of Metro be concerned about the  
21 Eber Wine & Liquor pension liability?

22 A. Well, as I said, if the PBC goes after the buyer of the  
23 assets because the buyer has deep pockets, there would be  
24 concern and I think that was borne out in I believe it was some  
25 testimony from Southern saying, you know, those pension

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Torchio - Redirect

1 liabilities can be a black hole. And I think that's kind of  
2 what they are saying is that you never know what your exposure  
3 is going to be for sure, but you know that it can be dangerous  
4 because the PBGC will go after deep pockets.

5 Q. In your view, would a purchaser look to seek some form of  
6 price protection against the possibility that this pension  
7 liability would be something they would have to deal with?

8 A. So if the pension liability did not go along with the  
9 assets?

10 Q. Correct. Yes.

11 A. So in that case I would expect that the buyer would, you  
12 know, generally, rely on reps and warranties to make sure that  
13 if something adverse happened, some adverse issue with the  
14 PBGC, that they were going to come after the buyer, that they  
15 would have reps and warranties. Of course that is a little  
16 difficult here because if it was sold I don't know what assets  
17 would back up the reps and warranties. But as a general  
18 matter, that's what you would observe from a purchase of a 79  
19 percent stake.

20 MR. MULRY: If I may just have one moment, your Honor.

21 (Counsel confer)

22 BY MR. MULRY:

23 Q. And to what extent would the presence of this liability  
24 chill, in your view, the desire of any buyer to even enter into  
25 a transaction with this kind of liability?



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1 A. Well, as I said, I think that, you know, in my view, the  
2 inability of Eber-Metro providing reasonable reps and  
3 warranties would deter the kind of -- it would be a measure of  
4 price protection. It wouldn't be available, and it would  
5 likely result in a walkaway from the deal.

6 MR. MULRY: Okay. Thank you, Mr. Torchio.

7 Thank you, your Honor.

8 MR. BROOK: No recross.

9 THE COURT: You are excused. Thank you, Mr. Torchio.

10 THE WITNESS: Thank you, your Honor.

11 (Witness excused)

12 MR. MULRY: Your Honor, with that, the defendants  
13 rest.

14 THE COURT: I take it there is no rebuttal case.

15 MR. BROOK: No, your Honor.

16 THE COURT: Okay. Do you want to do your argument  
17 after lunch? Is that what you would prefer?

18 MR. BROOK: That would be my preference, your Honor.

19 THE COURT: All right. We will start at 2:15.

20 MR. BROOK: I'm sorry. Was that 2:15?

21 THE COURT: 2:15.

22 Okay. Thank you. And I am genuinely appreciative  
23 that we got this in in the time in which we got it in.

24 And I also want to alert you that I have made a  
25 referral for settlement purposes to Judge Parker, and you

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1 should go to her chambers before the day is out to make  
2 arrangements for how you are going to handle that, when you are  
3 going to handle it. Okay?

4 MR. BROOK: Thank you.

5 MR. MULRY: Thank you, your Honor.

6 (Luncheon recess)

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Summation - Mr. Brook

## A F T E R N O O N S E S S I O N

2:15 p.m.

THE COURT: Okay. Mr. Brook.

MR. BROOK: Your Honor, the parties do have, I think, something of an update in terms of settlement conference scheduling. Do you want to hear that now or after?

THE COURT: Later.

MR. BROOK: What's that?

THE COURT: Later.

MR. BROOK: Okay. Thank you, your Honor.

Lester Eber tried to beat Southern Wine & Spirits when they tried to come into New York, and he did so in large part by trying to partner with this Georgia-based distributor, NDC. And in the course of that deal, he actually ended up getting a put option -- this is in Exhibit 25, which I'm not going to put on the screen -- that valued the company at \$275 million. And we don't have all the details on that, but we are pretty sure that there were conditions on that that weren't met. It appears that what happened was they had to -- they had to actually be successful in holding Southern at bay if they wanted to get to that kind of valuation. We know that discussions happened with Southern. It was testified to by various different people, including Mr. Hager in the deposition on behalf of Southern Wine & Spirits, but we never got a number for what it was. But we know what Lester wanted --

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Summation - Mr. Brook

1 THE COURT: Could you speak more slowly?

2 MR. BROOK: Sure.

3 We know what Lester wanted. It was 275 million. But  
4 instead of beating Southern, instead of holding them at bay,  
5 the partnership with NDC failed. The company crumbled under  
6 the pressure. And when going to pick up the crumbs, the  
7 evidence has shown that Lester tried to keep all those  
8 crumbs -- all those crumbs for himself and his daughter to  
9 the exclusion of others, even though he was the trustee of a  
10 trust that held that company, that was created by his father  
11 for the purpose of holding that company, and for which Lester  
12 was supposed to be the trusted son to take care of the family.  
13 And instead, in the process of doing a variety of transactions,  
14 starting with negotiating his own consulting agreement with  
15 Southern, systematically destroyed the trust's assets,  
16 everything other than the publicly traded stocks that were held  
17 by a bank.

18 And as a result, just to put some numbers on it, if we  
19 look at everything that has happened, if the trust had gone the  
20 way it was supposed to and Lester passed away when he did, none  
21 of these transactions we are challenging happened, Wendy Eber  
22 would have ended up with a 14 percent interest in  
23 Eber-Connecticut. But here today, Wendy Eber is claiming an 85  
24 percent interest in Eber-Connecticut. 100 percent of what  
25 belonged to the trust is now what Wendy Eber wants this Court

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Summation - Mr. Brook

1 to put the stamp of approval on her taking.

2 Now, in my opening -- you know, I normally am a lawyer  
3 who believes in trying not to overstate your case. You don't  
4 want to oversell something. And I called the defense -- part  
5 of the defense legally insane, and that's a pretty big promise  
6 to make. But I think, your Honor, what I was getting at is the  
7 testimony of Frank Torchio today, where they have their own  
8 expert witness characterizing the key transaction here, the  
9 Alexbay transfer, as something that an investor, aware of all  
10 the facts, would consider to be a fraudulent conveyance or a  
11 shell game. This is the kind of opinion testimony that is  
12 normally elicited by a plaintiff challenging a transaction. It  
13 is objected to by the defense, and that objection is sustained  
14 for usurping the fact-finder's function.

15 THE COURT: Slow down, please.

16 MR. BROOK: Sorry.

17 It is extraordinary testimony for the defense to  
18 effectively be: We were only defrauding creditors. The  
19 shareholders weren't harmed. Even though, putting aside the  
20 fact that the shareholders were also trust beneficiaries, and  
21 the extra duties there. It's just an extraordinary argument  
22 that, as I said, and I still believe, does not make any legal  
23 sense whatsoever.

24 And it is also predicated upon expert testimony that  
25 is, in and of itself, highly questionable and subject to quite

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Summation - Mr. Brook

1 a few different caveats and was the result primarily of a legal  
2 instruction. Mr. Torchio himself, you know, could -- you know,  
3 he did not reach the conclusion that this company was insolvent  
4 on his own. He was told to do so basically using a bunch of  
5 numbers that were very favorable.

6 But all things being equal, and they aren't, but let's  
7 assume that they are, between the expert testimony, on that key  
8 transaction, this Court also has the testimony of Andy Eder,  
9 who made perfectly clear that he has been willing and wanting  
10 to buy this company for the better part of 14 years, and he  
11 recently made an offer, something that Mr. Torchio himself has  
12 not -- did not take into consideration, but he said would be  
13 important in determining the current value of the company.

14 So that transaction, of course, is the main reason why  
15 we are here. That was the biggest one. But it is actually --  
16 there is a number of different transactions, both before and  
17 after, that we are asking this Court to set aside, and I think  
18 that, framing that with plaintiffs' Demonstrative 2 -- if you  
19 could put that up, please, it would be helpful -- so we will  
20 get to the Southern consulting agreement later, but as  
21 explained in opening and as shown through the evidence at  
22 trial, that was -- the Southern consulting agreement was what  
23 led to the funding shortfall that caused a lot of other  
24 problems.

25 We have also shown that there were a lot of legal --

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Summation - Mr. Brook

1 THE COURT: You know, you are speaking very quickly.  
2 It is hard enough to understand when there are no masks  
3 involved, but it is very hard.

4 MR. BROOK: I will try to pace myself.

5 THE COURT: That's a good idea.

6 MR. BROOK: Yes.

7 Ali, can you make sure to remind me when we get close  
8 on time?

9 So after Southern -- after the company is supposedly  
10 in a great deal of financial distress, certainly on the books  
11 that were presented to the auditors, the numbers were not  
12 looking good. And so one thing that we saw happened is the  
13 Canandaigua National Bank, which was a trustee, manager of the  
14 pension plan, or administrator, rather, in terms of  
15 administering the benefit, the investments that were made, and  
16 also the lender to Eber-Connecticut, and those three functions  
17 were kept essentially separate. That's the testimony of Bob  
18 Lowenthal of CNB in deposition testimony that's been  
19 designated.

20 Bob Lowenthal, we saw in February of 2010, started  
21 asking what's up with this pension liability? You know, they  
22 were looking at whether Lester had to put up more collateral  
23 for the loan. And the e-mail -- I believe it is Exhibit 225 --  
24 makes it perfectly clear that -- don't put it up Ali -- makes  
25 it --

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Summation - Mr. Brook

1 THE COURT: Makes what perfectly clear?

2 MR. BROOK: I'm sorry, I was -- it makes perfectly  
3 clear that they were under the impression -- by "they,"  
4 Canandaigua, that this was Lester's personal liability, that he  
5 had something that he might have to do in terms of paying the  
6 pension plan. Bob Lowenthal's deposition testimony, designated  
7 by plaintiffs, shows that he, from the entire time he was on  
8 the account, did not know about any liabilities held by Eber  
9 Brothers Wine & Liquor or Eber-Metro that could have affected  
10 Eber-Connecticut. He said that they repeatedly asked for  
11 financial statements for those companies. He was told that  
12 they were shells. And he --

13 THE COURT: He was told that they were?

14 MR. BROOK: That they were shell companies, that they  
15 were empty shells.

16 THE COURT: Shelf?

17 MR. BROOK: Shell, S-H-E-L-L.

18 THE COURT: Okay, got it.

19 MR. BROOK: That's what he said, you know that --  
20 either -- he couldn't remember which one, but either Lester or  
21 Wendy is the one who told him that. And of course a company  
22 with potentially \$10 million in liabilities, as is now claimed,  
23 is not exactly a shell company if it's on its own, not to  
24 mention it, of course, does own this Eber-Connecticut  
25 subsidiary. So what's important is another part of their



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Summation - Mr. Brook

1 defense is effectively saying we were committing bank fraud.  
2 We were lying to CNB about the different liabilities that were  
3 had.

4 Now, the truth is, it's somewhere in the middle.  
5 Ms. Eber was not being perfectly truthful with this Court when  
6 she talked about how she believed that this pension plan and  
7 other liabilities were going to follow all the subsidiaries.  
8 And the very first transaction that's on this list to be set  
9 aside proves that. It was the magic number of six percent,  
10 exactly the amount necessary to remove Eber-Connecticut from  
11 the controlled group for Eber Wine & Liquor, because six  
12 percent plus the 15 percent sold to Eder-Goodman gets them just  
13 below 80. So if they wanted to be more obvious, I don't know  
14 how they could have been.

15 And that transaction is unquestionably a fraudulent  
16 transaction. Whether it was a product of the inquiry from  
17 Canandaigua two or three months earlier, it's hard to know  
18 exactly what the straw that broke the camel's back was in this  
19 instance that caused them to start to document their loans,  
20 hire Glenn Sturm, transfer the assets, but it's clear that, by  
21 the middle of 2010, that was the path that they were on.  
22 Lester's supposed loans to the company and, to be clear,  
23 plaintiffs --

24 THE COURT: Lester's what?

25 MR. BROOK: Supposed loans to the company.

L9m2Kle3

Summation - Mr. Brook

1 THE COURT: Let's just pause on that for a minute.

2 MR. BROOK: Sure.

3 THE COURT: The paper record here is so gigantic that  
4 I can't claim to have looked at every page of it. Are there  
5 any checks, we will start with checks, from Lester to the  
6 company that are said to document loans in the record?

7 MR. BROOK: Yes, your Honor.

8 THE COURT: How much?

9 MR. BROOK: It is somewhere between 1 point -- the  
10 numbers I have seen -- I will confess I have not added up all  
11 the checks personally. I believe the minimum amount of checks  
12 written from late 2009 through the middle of 2012 is  
13 \$1,526,000, and I am basing that off of an e-mail that I think  
14 is dated sometime in January 2012. It looks like there were  
15 another few hundred thousand dollars in payments afterwards.

16 So if I can, you know --

17 THE COURT: Let's just move along.

18 MR. BROOK: Okay. So to be clear, we do acknowledge  
19 that there was money deposited into the company's accounts.  
20 The reason why I call even those late payments supposed loans  
21 is because, in reality, this is just Lester giving back to the  
22 company that which he took through the Southern deal. But we  
23 do acknowledge that those payments were made and, as I will get  
24 to later, plaintiffs do acknowledge that that is something that  
25 should be taken into account when determining the final

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Summation - Mr. Brook

1 balances of the equities here.

2 But --

3 THE COURT: So you concede that point.

4 MR. BROOK: We concede that, at least as to the  
5 principal amount paid, where they can show that the money was  
6 paid into the company, that that is money that should be  
7 credited back. I think it is more than offset by what was  
8 taken out in other regards, but that's definitely part of the  
9 calculus.

10 As far as the six percent goes, you know, there is --  
11 Andy Eder said he heard three different stories about it, and  
12 the fact is we actually heard four different stories about it,  
13 because Andy Eder said that he heard that it was initially for  
14 Wendy due to something having to do with her divorce, then it  
15 was due to Wendy being a good employee, then it was due to  
16 Glenn Sturm doing good work.

17 And the testimony from both Lester and Wendy under  
18 oath has been that that was actually -- that Glenn Sturm wanted  
19 10 percent and got negotiated down to six percent, and I  
20 suppose that's some sort of magical coincidence that he got  
21 negotiated down to the exact percentage that they were going to  
22 give to Wendy. So not particularly believable, but then of  
23 course there is --

24 THE COURT: Is Sturm still alive?

25 MR. BROOK: My understanding is that he is severely

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Summation - Mr. Brook

1 ill and has been suffering from significant problems with  
2 cancer for a long time, so he was -- and going back to  
3 something I said yesterday, the decision was made, after the  
4 defense waived any advice-of-counsel defense, not to burden  
5 Mr. Sturm with a deposition while he was in that state, along  
6 with dealing with other lawyer witnesses.

7 And just as further background, there was a great deal  
8 of litigation during discovery over the disclosure of  
9 privileged information and whether or not certain information  
10 was able to be accessed by the plaintiffs for various reasons.

11 So the six percent, the plaintiff's position,  
12 especially since we now know, you know, in addition to all the  
13 other problems with it being a nonrecourse note at a price that  
14 was never disclosed to Eder-Goodman, it's in Wendy's hands now.  
15 It was transferred to her simply for exchanging the note back  
16 to her, her assuming that in 2017, at a time when there was  
17 \$150,000 dividend payment about to come due. And even if Wendy  
18 says that wasn't a value to her, surely because she just put it  
19 back into the company, surely that would have been a value to  
20 Glenn Sturm if this were a real transaction, if he weren't,  
21 instead, just a placeholder for a transfer to Wendy.

22 So that is a transaction that should be set aside, and  
23 that's important for a couple of reasons, not only because it  
24 restores six percent of the ownership interest, which is not a  
25 small amount, given the values that we know Eber-Connecticut

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Summation - Mr. Brook

1 now has, but also because that transaction, that six percent  
2 sale to Polebridge Bowman was the basis that Lester used when  
3 he asked Judge Rosenbaum, in the Monroe County Supreme Court,  
4 to declare the transfer of Eber-Metro in exchange for his debt,  
5 to be commercially reasonable. He said that is the most  
6 reasoned transaction. He said this was a transaction on the  
7 open market, as if it was a market transaction.

8 Their own defense to this transaction undermines that  
9 assertion. They say it was compensation. If it's  
10 compensation, it's not a market transaction. So in addition to  
11 being a bad transaction in and of itself, it is the foundation  
12 for the fraudulent Alexbay transfer.

13 THE COURT: The fact of the holding in Monroe County,  
14 that it was commercially reasonable, is really immaterial to  
15 this case, isn't it?

16 MR. BROOK: Completely agree, your Honor, yes.

17 THE COURT: Because that question is not implicated  
18 here.

19 MR. BROOK: No. You are absolutely right. And that  
20 was something that was argued at summary judgment, and  
21 Judge Parker absolutely got it right, that compliance with the  
22 Uniform Commercial Code has nothing to do with fiduciary  
23 duties, especially not when that Court is severely misled.  
24 But, you know, it --

25 THE COURT: But under *Rooker-Feldman*, I think, this

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Summation - Mr. Brook

1 Court has to respect that decision.

2 MR. BROOK: Sure.

3 THE COURT: But that decision doesn't decide anything  
4 of moment here.

5 MR. BROOK: That is exactly right, your Honor. But I  
6 will tell you why I am -- even though -- and of course  
7 Judge Parker has already ruled that this transaction, the  
8 Alexbay transaction, is void under the no-further-inquiry rule.

9 And on that point, I want to say two things:

10 One is, I believe Mr. Mulry really made a mistake in  
11 terms of giving away the truth here when he characterized in  
12 his opening Judge Parker's decision as saying that's not the  
13 end of the inquiry. We are having a trial here because that's  
14 not the end of the inquiry, but the rule is called the  
15 no-further-inquiry rule.

16 So certainly as a matter of law the Court is aware of  
17 plaintiff's position. But it's relevant anyway to talk about  
18 this transaction because -- and I don't have, unfortunately,  
19 the full citation with me here, but I know it is in a number of  
20 briefs. It's a case called *Birnbaum v. Birnbaum*, and it relies  
21 on the treatise *Scott on Trusts*. It is from, I want to say,  
22 1983 or 1984 or so. It's a New York Appellate Division case  
23 that lays out exactly what a Court, in unwinding a violation of  
24 the no-further-inquiry rule, should be doing. And I'm going to  
25 read just the part of it that -- I think is most relevant

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Summation - Mr. Brook

1 here -- which is, "If the trustee has not resold the property  
2 or has resold it to a person who is not a *bona fide* purchaser,  
3 the beneficiaries can insist upon a reconveyance of the  
4 property, and the trustee is accountable for any income  
5 received by him from the property but is entitled to receive  
6 the amount which he paid for it with interest and, unless he  
7 was guilty of actual fraud, the value of all improvements made  
8 by him."

9 And that last part is what I am focused on here  
10 because it goes to a more overarching principle of New York  
11 law, which is, that someone who wrongly takes property and then  
12 improves upon it is not entitled to be compensated for it if  
13 they knew it was wrong. The no-further-inquiry rule needed to  
14 be laid out like this because it applies even when there is  
15 good faith. A trustee might simply just not understand their  
16 legal duties, buy something from a trust, and have to give it  
17 back, and if they invested a lot of money into it, it's fair to  
18 pay them back.

19 So what this Court has to decide is what was the state  
20 of mind there? Was Lester in fact acting in good faith? And  
21 if instead --

22 THE COURT: I'm sorry, was Lester?

23 MR. BROOK: Was Lester acting in good faith when he  
24 took these actions? And that's why even though --

25 THE COURT: When you say when he took these actions,

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Summation - Mr. Brook

1 be specific. Which actions?

2 MR. BROOK: Almost all of them, but certainly when it  
3 comes to taking Eber-Metro from Eber Wine & Liquor, claiming  
4 that -- and telling Judge Rosenbaum -- again, the Court doesn't  
5 have to overrule that decision to recognize that Lester lied to  
6 a court to try to achieve his outcome; that Lester, you know,  
7 grossly misrepresented the value of the company; that he  
8 omitted to mention the Eder-Goodman transaction; that -- you  
9 know, and let's just -- we can go even one better than that.

10 THE COURT: But, no, let's -- I'm a little slow,  
11 right?

12 MR. BROOK: Yes.

13 THE COURT: So the Southern transaction is 2007,  
14 right?

15 MR. BROOK: Yes.

16 THE COURT: And 2010, they, in your submission --  
17 "they" being the defendants -- go through this little  
18 Polebridge Bowman transfer, the predominant or exclusive  
19 purpose of which is to insulate Eber-Connecticut from the  
20 pension liability, whatever that turns out to be. Yes so far?

21 MR. BROOK: Yes, that's the primary purpose.

22 THE COURT: And -- let me just check dates. So  
23 somewhere along the line between 2007 and 2010, '11, '12, if I  
24 have the chronology correctly, yeah, Lester is getting a pot of  
25 money from Southern personally, he is lending what you say is



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Summation - Mr. Brook

1 around a million and a half, maybe a little more, back. That  
2 becomes the true value of the loans, and then sets up this  
3 Alexbay foreclosure (a) on an inflated number, is that right?

4 MR. BROOK: We believe his loans were inflated, yes.

5 THE COURT: But in any case, even if they are not  
6 inflated, it is on this million and a half.

7 MR. BROOK: Or let's just even give him credit. Let's  
8 say it's 3.6, what he told the Court his loans were worth with  
9 interest. That's still way less than the value of the asset  
10 that he took, which was 79 percent of Eber-Connecticut. That  
11 was the exchange.

12 THE COURT: Okay.

13 MR. BROOK: He told the Court, and this is what the  
14 transaction documents show, that the debt is being canceled.  
15 They valued it at 3.6 million with interest at that time. And  
16 in return, Eber Wine & Liquor is giving away 100 percent of its  
17 ownership, which is all of the ownership of Eber-Metro, which  
18 included primarily the 79 percent interest in Eber-Connecticut  
19 or Slocum. It also included that \$350,000 nonrecourse note.  
20 So that was another asset technically on the books.

21 THE COURT: But you get from the million five or  
22 million seven, or whatever it was --

23 MR. BROOK: Yeah.

24 THE COURT: -- to the three million something on the  
25 basis of these alleged amended and restated notes that stick in

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Summation - Mr. Brook

1 a nine percent interest rate --

2 MR. BROOK: Yeah.

3 THE COURT: -- when at the beginning they were  
4 noninterest bearing, right?

5 MR. BROOK: Correct, your Honor.

6 THE COURT: Okay. And would it be your position that  
7 the amendment and restatement of the notes to put in this nine  
8 percent is a self-dealing transaction all the way, is that  
9 right? That's your position.

10 MR. BROOK: Yes, it is. I mean, to -- I mean it's a  
11 little complicated. And if I may, so it is self-dealing.  
12 Under the trust instrument, trustees are allowed to make  
13 secured loans. That, of course, makes sense when the trust  
14 instrument says that one of the trustees will be a bank that is  
15 the regular lender to the company. I very much doubt Allen  
16 Eber ever imagined his son would be making secured loans to the  
17 company. But it is self-dealing. We are not saying it is  
18 invalid on its face as a matter of that, and it does appear to  
19 have at least been signed off by John Ryan. I think at the end  
20 of the day --

21 THE COURT: Who is John Ryan?

22 MR. BROOK: I'm sorry. That was the CFO who signed  
23 the document, but he did not initial the interest rate change.

24 THE COURT: And he works for Lester.

25 MR. BROOK: He works for Lester.

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Summation - Mr. Brook

1           And those notes do not appear to have been authorized  
2 by the board of directors, which is, as a matter of corporate  
3 law, putting aside the trustee issues, that's what would  
4 normally have to happen with Lester abstaining in order to  
5 approve that kind of self-dealing.

6           THE COURT: And in the absence of board approval by a  
7 majority of disinterested directors, fully informed of the  
8 facts, the burden would be on Lester to prove the entire  
9 fairness of the insertion of the nine percent interest rate,  
10 yes?

11           MR. BROOK: Correct, your Honor. It is our position  
12 that virtually every transaction we are talking about here  
13 involving the corporations is subject to the entire fairness  
14 doctrine, because at no time, certainly not after 2007, when  
15 the board was made up of Lester, his daughter, and his personal  
16 attorney, because Mr. Gumaer in a -- I can't remember the  
17 exhibit number off of the top of my head, but he actually was  
18 Lester's personal attorney as well as trustee and director  
19 since 2001.

20           THE COURT: Now, is there, in your view, a complete  
21 failure of proof on entire fairness even assuming everything  
22 else with respect to the insertion of the interest rate?

23           MR. BROOK: Yes, your Honor. I think that what we  
24 have is we have got -- I think there is not only failure of  
25 proof, I would say that the preponderance of the evidence at

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Summation - Mr. Brook

1 least weighs on the side of this being a fabrication, that we  
2 have got -- the 2005 and '6 financial statement lists some sort  
3 of a loan to some unnamed officer at a balance of 200-and-some  
4 thousand dollars at the end of 2005. How can they amend and  
5 restate that at 575? That same 575 note was not in the first  
6 draft of the trustee meeting minutes when, in 2011, the  
7 trustees met and supposedly ratified the loans. The first  
8 ratification minutes only mention two loans.

9 And on that, it's important to note that, although he  
10 wasn't here in person, Rick Hawks, the Canandaigua person who  
11 was acting as co-trustee, disputed the characterization of the  
12 meeting as involving any kind of a ratification, not that a  
13 *post hoc* ratification would be legally valid anyway, but even  
14 that much is --

15 (Continued on next page)

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L9MsKLE4

Summation - Mr. Brook

1           THE COURT: Aren't all ratifications inherently  
2 post hoc?

3           MR. BROOK: I suppose so, but as opposed to approving  
4 a transaction ahead of time, so ...

5           I think there is one other aspect of this, your Honor.  
6 And I apologize it is going to involve more of the general  
7 ledger on this. Your Honor may have noticed the numbers they  
8 are quoting for the value of the 2006 amended notes are  
9 actually lower than even one of them. It is usually they say  
10 1.434 million in some of the documents, sometimes the minutes  
11 say 1.2 million, and that's because an adjustment had to be  
12 made for the fact that there was a huge balance on the books of  
13 Eber Wine & Liquor for Lester's personal spending to the tune  
14 of \$850,000, all of which had been paid for Lester's benefit  
15 without any interest at the same time that he supposedly was  
16 loaning money to the company at 9 percent interest.

17           That is just for the court's reference.

18           THE COURT: That's good action.

19           MR. BROOK: He's the best arbitrator I've ever seen.

20           That's Exhibit 160 at page 50. Those are the personal  
21 accounts balance.

22           THE COURT: Now back to the loans.

23           MR. BROOK: Yes.

24           THE COURT: Are there any books of original entry that  
25 are contemporaneous that document the loans from Lester to the

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Summation - Mr. Brook

1 companies?

2 MR. BROOK: Are we talking about the 2006 ones or  
3 the -- because there is nothing on 2006, but the later ones --

4 THE COURT: Anything from 2006 on.

5 MR. BROOK: So for the later stuff, for the stuff that  
6 relates to what is called the line of credit note that has two  
7 different dates on it, approved by the board in February 2010,  
8 there are a number of different journal entries and such in the  
9 general ledger that reflect those payments.

10 Part of what I put into evidence -- just because I  
11 didn't know where it was going to go, it is for the court to  
12 look at, if you want to have you or your clerk do it -- there  
13 is correspondence between Wendy and accountants over a period  
14 from, I would say it starts probably in October 2011 through  
15 July 2013, where she is trying to figure out what the balances  
16 are because these books are such a mess. Even they couldn't  
17 figure it out. They were debating it for nearly two years  
18 trying to figure this stuff out. That is part of the challenge  
19 that this case certainly presents.

20 At the end of the day, I think one way that this court  
21 could handle it, because of the different balances, is to look  
22 at the law and the bylaws, the bylaws, to look at the law and  
23 the bylaws. As we showed, the Eber Wine & Liquor bylaws do not  
24 permit contracting a loan without board authorization. The  
25 only board authorization which, you know, certainly

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Summation - Mr. Brook

1 self-dealing and not independent. But for the sake of just  
2 getting this over with, plaintiffs are willing to say it is a  
3 board authorization, the February 26, 2010 authorization for  
4 the line of credit note.

5 Let's say that authorizes it up to \$1.5 million. That  
6 means that even though there are deposits more than 1.5  
7 million, and we're not exactly sure how much, the court would  
8 be --

9 THE COURT: I'm sorry. These are deposits from where?

10 MR. BROOK: From Lester to Eber Wine & Liquor/  
11 Eber-Metro.

12 THE COURT: This is what you referred to before?

13 MR. BROOK: Yes. This is the part that I think are,  
14 in the law that I quoted earlier, is entitled to get this back.  
15 These monies that he put into the company are the equivalent of  
16 what he paid for it. So what he paid for it in terms of what  
17 was legally allowed by the company was \$1.5 million, and that's  
18 because anything more than that that he tries to claim would  
19 have violated the same bylaws that the defendants want to try  
20 to use to try to prevent my clients from even getting their  
21 shares from the trust.

22 So just to try to go back to the transactions that  
23 we're going to unwind. I'll try to be quick. You know that we  
24 have relatively short time, and I do want to just cover them.

25 The Lester April 2012 employment contract that was

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Summation - Mr. Brook

1 recently discovered, that should be set aside because that was  
2 at a time when, undisputedly, Eber-Connecticut was a trust  
3 asset. This was before the Alexbay transaction. And yet this  
4 employment contract, which gave Lester a death benefit,  
5 indemnification, etc., was never approved by any demonstrable  
6 board action by any company, let alone the trustees who would  
7 have had to approve that. The trust beneficiaries would have  
8 had to -- we don't have to go there. Even the first layer of  
9 approval wasn't met. It was authorized solely by Wendy Eber,  
10 his own daughter. I can see why they concealed this document  
11 It blows up their whole claim that the company was on death's  
12 doorstep in April 2012.

13 What kind of company gives a CEO who is driving his  
14 company into the ground and has no money an employment contract  
15 with significant severance benefits, indemnification clauses  
16 and such, at a time when the company doesn't have money to do  
17 it? That's when companies usually fire someone, not gives them  
18 the most employment protection they've ever had.

19 And that leads me to the next point, which is -- Ali,  
20 can you put it up, please -- demonstrative two, so we can all  
21 follow along.

22 So it's not actually there. The fifth one down is  
23 Wendy's employment contract. She got substantially the same  
24 employment contract only that is dated afterwards. So Lester  
25 authorized that for her, and as part of that agreement, she got



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Summation - Mr. Brook

1 the same sort of termination benefits. So if this court were  
2 to order that the company is returned to my client's control  
3 and they decide to terminate Wendy or the court removes her  
4 from her position, she is going to claim that she is entitled  
5 to triple her last year's salary and bonus, which was \$400,000,  
6 meaning she is going to try to get a \$1.2 million payment for  
7 being fired.

8 And that's why we want the court to erase that -- to  
9 rescind that transaction, and that is consistent with imposing  
10 a constructive trust, particularly because of the component of  
11 it of giving her 2,000 shares of Eber-Metro. That was a trust  
12 asset just a few months earlier, and Lester gave it away to  
13 her. It doesn't matter if it was compensation for work she was  
14 actually doing. He did not have the right to do that, and it  
15 has to come back to the trust.

16 The Slocum of Maine call option we haven't talked  
17 about much. Part of the overall 2005 transaction is this Maine  
18 entity that helps import things without paying too much duties  
19 in Connecticut. It was a call option that Eber-Metro bought,  
20 Eber-Metro exercised for \$10. And then in the exercise  
21 document, which is Exhibit 55 -- don't put it up, Ali -- it's  
22 going to Lester 50 percent and Wendy 50 percent.

23 This is the kind of thing that can only work if this  
24 was, in fact, just Lester and Wendy's company. If there were  
25 no other duties. Upon imposing a constructive trust, it has to

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Summation - Mr. Brook

1 be undone. It is apparently a very important part of the  
2 Eber-Connecticut business.

3 The 750 voting preferred shares to Lester issued  
4 coincidentally just two months after this lawsuit was filed.  
5 Those have to be unwound because, again, those are trust assets  
6 that Wendy is granting to her father, him to herself. It  
7 didn't even go through Mr. Gumaer, who just a week earlier had  
8 resigned from any director position with these companies. It  
9 definitely was not approved by the other trustees, and it is  
10 invalid as a matter of corporate law.

11 Then there is the call option exercise by Lester. And  
12 this is where Lester tried to intercept the shares of Eber  
13 Brothers & Co., Inc., that Canandaigua was trying to transfer  
14 to my clients, and that is invalid for a number of reasons, not  
15 the least of which is Lester was a trustee. He had a duty to  
16 act for the benefit of my clients. And for him to keep quiet  
17 and sit on his knowledge that there is some sort of transferee  
18 instruction buried in the bylaws that we didn't have access to  
19 was a gross breach of his fiduciary duty. It was an attempt to  
20 gain the system, and it is barred by res judicata because the  
21 trust proceeding is over with. This court shouldn't be messing  
22 with it. It is barred by New York law that says that  
23 transferee instructions are not valid unless they appear on the  
24 face of the certificate.

25 If the court looks at Exhibit 134, which is copies of

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Summation - Mr. Brook

1 those certificates, the court will see that the first sentence  
2 on the certificate says that they are transferable on the books  
3 of the corporation upon being properly endorsed. That is not a  
4 restriction on transfer. Even if it does later say, as the  
5 defense will point out, that it is subject to the bylaws, the  
6 fact is it says it is transferable right there. Unless you're  
7 publishing copies of the bylaws everywhere and attaching them  
8 to the certificates, which they weren't, it is not a  
9 restriction.

10 The bylaw amendments in 2021. This is the most recent  
11 thing, and this is just an effort to entrench management. What  
12 happened was -- this is Exhibit 00000, the defense put it in,  
13 the court should take a look at this. In short, Wendy  
14 appointed her husband to be a director of Eber Brothers for  
15 three hours, during which time he elected her as the sole  
16 officer, he authorized her to amend the bylaws, and ratified  
17 every decision she had ever made during her tenure. In fact,  
18 he made all those decisions after one hour, according to these  
19 documents, and then resigned two hours later. So he spent more  
20 time afterwards than beforehand. I mean, it is just -- it is,  
21 perhaps, the best example of what this case is about, which is  
22 a battle between form and substance, only the form isn't even  
23 particularly compelling.

24 I see that your Honor, I am past my time. The next  
25 part I was going to go to was some damages and the Southern

L9MsKLE4

Summation - Mr. Brook

1 agreement.

2 THE COURT: Go ahead.

3 MR. BROOK: OK. So the Southern consulting agreement  
4 is, as I said before, critical --

5 THE COURT: I'm sorry. The what?

6 MR. BROOK: The Southern consulting agreement is a  
7 critical part of this case. Eber Brothers did not die on  
8 August 30, 2007. If you're selling wine and liquor through  
9 subsidiaries, you're not out of business. If you're paying a  
10 pension plan to cover your employees who were with you for  
11 decades, you're not out of business. They didn't terminate it.  
12 They tried to keep it open for years afterwards.

13 If you are still winding up and selling liquor in New  
14 York, if you're telling the IRS that Lester spent substantially  
15 all his time in New York City winding up the business through  
16 the end of fiscal 2008, you're not out of business. But here  
17 is the thing. Even if Eber Brothers Wine & Liquor Corp. had  
18 completely shut down by the end of February 2007, let's go back  
19 to a few months earlier, this would still be a violation of  
20 Lester's duty of loyalty because he had negotiated by  
21 February 7, 2007, using corporate counsel, his consulting  
22 agreement, and I believe --

23 All right. I was going to put it up there. It's  
24 Exhibit 93, I would ask your Honor to reference. I don't have  
25 the page number offhand, but there is --

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Summation - Mr. Brook

1 Do you have it? Page ten. She's saying it is page  
2 ten. She does this stuff pretty well.

3 All right. That's right. Paragraph six of this  
4 agreement shows -- this has a fax line of February 8, 2007 --  
5 that by then, Lester and Southern had already agreed that he  
6 would enter into a consulting agreement as part of the overall  
7 deal, only then it was a five-year -- it was only \$500,000 a  
8 year, not the full 600 that later happened.

9 Ali, if you can zoom out. Let's look at the paragraph  
10 above that.

11 At that time, the expectation was that all of the Eber  
12 entities and their owners would enter into restrictive  
13 covenants. But at the end of the day, what is notable, if the  
14 court looks at that same closing binder we were looking at  
15 earlier today, the only restrictive covenants were entered into  
16 by Lester and one essentially one unimportant subsidiary, Eber  
17 Acquisition Corp, Eber Wine & Liquor, Eber-Metro,  
18 Eber-Connecticut. None of them sign a restrictive covenant,  
19 but they were restricted nonetheless because Lester Eber was  
20 still running them. So as long as Lester was getting paid for  
21 his restrictive covenant by the competitor, they were  
22 effectively out of business in those competing states.

23 But here is one thing that is particularly interesting  
24 is Lester testified that, despite this, Eber-Connecticut sold  
25 wine in New York after 2008. So that just completely blows up

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Summation - Mr. Brook

1 this idea that somehow there is a geographical distinction that  
2 makes a difference here.

3 And ultimately one of the most important things is  
4 that, you know, you look at --

5 THE COURT: I thought you were talking about damages  
6 now?

7 MR. BROOK: Yes, we're talking about damages.

8 Getting to that, so I will just direct the court to  
9 take a look at page 88 of Lee Hager's testimony, lines 11 to 25  
10 where he says, Without the whole deal, there was no consulting  
11 agreement.

12 You don't have to go to that, Ali. Let's put up  
13 exhibit -- what is it -- demonstrative three, I believe, is our  
14 first set of damages for the Southern case.

15 So this is a compilation based upon the exhibit that  
16 contains all of Lester's schedule Cs for the Southern  
17 consulting money that he got, and it also gives some credit for  
18 the loan payments. And in this instance, I'll explain that  
19 second column. There were payments of \$212,000 in 2009.  
20 However, those were omitted because that was done before there  
21 was a borrowing authorization by the company. In any event, it  
22 still adds up to more than 1.5 million.

23 In 2011, it was actually closer to \$1 million, but  
24 that is the year when we deduct the \$850,000 in personal  
25 expenses, even though most were incurred years earlier. That

L9MsKLE4

Summation - Mr. Brook

1 was the year when it was written off the books. And so just to  
2 make it easy, even though it is not as beneficial to my  
3 clients, we will say that they come out then.

4 So what we have done here is, rather than the court  
5 trying to do two things in parallel, say Lester's loan at  
6 12.5 percent goes here, the Southern consulting payments need  
7 to go back there. The reality is -- and it is much easier for  
8 the court to do it this way without having to question whether  
9 that 12.5 percent was real or approved or not -- is just say,  
10 every time Lester cut a check to the company that was  
11 authorized by the board, he was paying down what he should have  
12 paid for Southern.

13 So this is the calculation that does that. It shows  
14 that if we assume that those loan payments were paying down the  
15 Southern balance, this is the amount of principal that is due  
16 and the amount of interest calculated in accordance with New  
17 York law, 9 percent. It isn't every single payment, because he  
18 was paid monthly. But instead, it is a more conservative  
19 approach calculating it so that interest only accrues on the  
20 next calendar year after any payment.

21 As the court may know, under New York law, an  
22 alternative method is appropriate where there is a number of  
23 different payments. Picking an intermediate reasonable date,  
24 and we prepared a chart on that, too, with a few different  
25 dates.

L9MsKLE4

Summation - Mr. Brook

1 If you can go to demonstrative four.

2 This approach, I would submit, is probably going to be  
3 the one that is easiest because the court can simply decide how  
4 much money Lester is entitled to get back versus how much he  
5 collected, balance them out, and then decide what date is  
6 reasonable.

7 I'll tell you why some of these dates I think are  
8 reasonable, very briefly.

9 January 1 --

10 THE COURT: Not now, because we can't spend the rest  
11 of the week on this.

12 MR. BROOK: Understood.

13 THE COURT: You're going to give me these?

14 MR. BROOK: I will give you those. I would just like  
15 to close with 30 seconds, your Honor, on this.

16 We will submit similar documents to you and defense  
17 counsel on the faithless servant doctrine, on the compensation  
18 earned there that should be disgorged. The reason why the  
19 faithless servant doctrine applies here is not only because of  
20 what we see under New York law for violating employment  
21 agreements, also because it serves as a valuable proxy for what  
22 would be an appropriate surcharge as a matter of trust law.

23 Lester was supposed to be the shepherd of this flock.  
24 That is what his father chose him to do. Instead, he was the  
25 wolf. And Wendy was not even the boy who cried wolf, because



L9MsKLE4

Summation - Mr. Santoro

1 she tried to help the wolf get the flock.

2 And that is why this court needs to impose some  
3 appropriate orders and damages, not only to ensure that New  
4 York law is complied with and that the trust beneficiaries are  
5 restored to the position they should have been in, but also to  
6 deter this kind of egregious conduct from ever happening again.

7 THE COURT: OK. Thank you.

8 Mr. Santoro.

9 MR. SANTORO: Thank you, your Honor.

10 Your Honor, I think I want to start with the loans  
11 that Lester made prior to the 2012 foreclosure.

12 THE COURT: I missed a word.

13 MR. SANTORO: The loans that Lester made to Eber Wine  
14 & Liquor and Eber-Metro prior to the 2012 foreclosure.

15 THE COURT: Loan, is that what you said?

16 MR. SANTORO: That's what I would like to start with.

17 THE COURT: OK.

18 MR. SANTORO: Because I think in determining whether  
19 Lester was unjustly enriched by the 2012 foreclosure, we have  
20 to look at two sides of the scale: The consideration that  
21 Lester gave and what Lester received.

22 So let's start with the easy part, and that is the  
23 loans made pursuant to the line of credit. That's the 2010  
24 line of credit and that's -- the line of credit is guaranteed.  
25 The guarantee in the line of credit are Exhibits GG and HH.

L9MsKLE4

Summation - Mr. Santoro

1           And I think where we should start is with Exhibit T,  
2           if we can put that up, please, Samantha. Let me explain what  
3           this is.

4           These are, you will see as we scroll through this,  
5           your Honor, checks made payable to mostly to Eber Wine & Liquor  
6           Metro, but also to Eber Wine & Liquor for the period 2007 up to  
7           the date of foreclosure. I think this is what you were looking  
8           for earlier. As Mr. Brook pointed out, these checks do line up  
9           with the general ledgers that are in evidence.

10           So during this time period, Lester was writing checks  
11           to the company, Metro and Wine & Liquor, so that those  
12           companies could meet their obligations. The principal  
13           obligations being the minimum funding obligations attendant to  
14           the Eber Wine & Liquor pension plan. We are not talking  
15           about --

16           We should also go to Exhibit U. There is a few  
17           additional checks, source documentation, documenting those  
18           loans. We could scroll through those, if you can, Samantha.

19           Then if we go to a demonstrative, which is exhibit  
20           quintuple K, 5Ks, we can see what the principal and accrued  
21           interest was on the line of credit note as of the date of  
22           foreclosure.

23           If we can go to page three of that exhibit, Samantha.  
24           If we can maybe zoom in a little.

25           So if you'll indulge me, your Honor, each payment is

L9MsKLE4

Summation - Mr. Santoro

1 made here, has a date, date of the advance, the amount of the  
2 advance. We run interest on it, and to the right of the page,  
3 we line it up to the defendants' exhibit. The total principal  
4 and interest on the line of credit note, calculated pursuant to  
5 its terms, was in excess of \$2,150,000. So I don't think that  
6 there is any dispute, or there will be any dispute upon a  
7 careful consideration of the documents, that Lester indeed  
8 loaned the millions of dollars in this very short time period  
9 to Eber Wine & Liquor and Eber-Metro to keep it above water.

10 THE COURT: And the interest you're running on it is  
11 12 and a half percent?

12 MR. SANTORO: That's correct, your Honor.

13 THE COURT: And later on at 15 percent; yes?

14 MR. SANTORO: That was for comparison purposes, yes,  
15 your Honor.

16 THE COURT: Who fixed the --

17 MR. SANTORO: Actually, the 15 percent is pursuant to  
18 the terms of the note. The note came due year end December 31,  
19 2011.

20 THE COURT: So why is there interest prior to that?

21 MR. SANTORO: The interest prior to that is pursuant  
22 to the terms of the note as is the interest pursuant to the  
23 terms of the note on the default, the 15 percent.

24 THE COURT: Who fixed the interest rate?

25 MR. SANTORO: It was set forth in the terms of the

L9MsKLE4

Summation - Mr. Santoro

1 note, your Honor.

2 THE COURT: Who signed the note?

3 MR. SANTORO: Lester Eber and the board. I don't have  
4 the exhibit in front of me. It's in evidence.

5 THE COURT: And the board?

6 MR. SANTORO: It was authorized by the board.

7 THE COURT: And the board consisted of whom?

8 MR. SANTORO: At that time, it was Wendy Eber, Lester  
9 Eber, and Mike Gumaer.

10 THE COURT: So what do you do with the fact that it  
11 was a totally conflicted board?

12 There was no disinterested board.

13 MR. SANTORO: Your Honor, I think for these purposes,  
14 we have, as a matter of law -- and maybe not from a practical  
15 standpoint, as your Honor is viewing it -- Mike Gumaer and  
16 Wendy Eber are indeed disinterested members of the board, and I  
17 think it should also be viewed --

18 THE COURT: You really think so?

19 MR. SANTORO: From a practical standpoint, your Honor,  
20 I understand the inference that you could draw.

21 THE COURT: You really think as a matter of law that  
22 they are disinterested?

23 MR. SANTORO: I do, your Honor.

24 THE COURT: And that's why?

25 MR. SANTORO: Mike Gumaer has independent duties to

L9MsKLE4

Summation - Mr. Santoro

1 the trustee and the company, as does Wendy Eber.

2 THE COURT: That's precisely why he is conflicted.

3 MR. SANTORO: In dealing with a third-party lender,  
4 Lester Eber, under these circumstances, I don't believe that he  
5 is.

6 THE COURT: He's the guy who signs the checks to pay  
7 his fees, Lester is, right?

8 MR. SANTORO: He may well be, your Honor, yes. But  
9 the mere fact that an attorney is being paid from one source  
10 does not necessarily mean that his duty is severed with respect  
11 to the beneficiaries, the trust and the company.

12 THE COURT: You missed my point altogether. You're  
13 absolutely right, his duty to the beneficiaries and the trust  
14 is not severed. So he is subject to two conflicting duties or  
15 two conflicting interests. One is his personal interest in  
16 getting paid and continuing as the attorney for Lester Eber,  
17 and the other is his duty to the beneficiaries.

18 And they are incompatible, aren't they?

19 MR. SANTORO: If, in fact, there are two conflicting  
20 legal duties in what you propose there, then yes, they would be  
21 incompatible.

22 THE COURT: So that's exactly what we have here.

23 Why not?

24 MR. SANTORO: Because I believe that Mr. Gumaer and  
25 Wendy Eber could wear two different hats under those

L9MsKLE4

Summation - Mr. Santoro

1 circumstances as a matter of law.

2 THE COURT: Do you have a case that says that?

3 MR. SANTORO: Not at my disposal, your Honor. There  
4 are --

5 THE COURT: That's startling. That's what this case  
6 is all about.

7 MR. SANTORO: There are fiduciaries who are serving in  
8 conflicted positions all the time, and especially in the case  
9 of an executor, for example, who owes money to a decedent who  
10 owes money to the estate, right. That executor has two  
11 conflicting duties. He is carrying out --

12 THE COURT: Suppose the executor owes money to the  
13 estate, and in its capacity as the executor of the estate,  
14 forgives the indebtedness. You think that is a self-interested  
15 transaction?

16 MR. SANTORO: Indeed, that would be a self-interested  
17 transaction.

18 THE COURT: Yes, indeed.

19 MR. SANTORO: The beneficiaries would have an  
20 opportunity to challenge that.

21 THE COURT: Right.

22 MR. SANTORO: And if, indeed, the will under your  
23 scenario permitted loans between the executor and the estate,  
24 the standard for --

25 THE COURT: Does that mean -- there is no dispute --

L9MsKLE4

Summation - Mr. Santoro

1 that a transaction between one of a number of trustees and  
2 another trustee is not for that reason alone prohibited?

3 That's a different question from whether such a loan  
4 can be made where the approval for the loan comes from trustees  
5 who are self-interested or otherwise conflicted with respect to  
6 whether or not to authorize the loan, isn't it?

7 MR. SANTORO: I'm not sure I agree with you there,  
8 your Honor.

9 THE COURT: Really?

10 MR. SANTORO: Yes, because if, in a case such as that  
11 and such as the instant case, where the governing instrument,  
12 the will here or the trust at issue, permits loans and, in  
13 fact, permits collateralization on loans, the question is not  
14 whether the transaction is authorized. The question is whether  
15 the transaction is done in good faith. You look into the  
16 specifics of the transaction to consider whether it is fair and  
17 reasonable.

18 THE COURT: And that's your burden.

19 MR. SANTORO: Well, the burden under these  
20 circumstances, with respect to this specific loan, we have  
21 proffered evidence to meet that burden.

22 THE COURT: And what is that evidence?

23 MR. SANTORO: That evidence is in front of you here,  
24 your Honor. The checks that Lester Eber -- well, your Honor,  
25 it's not necessarily the deposits into the company. It was

L9MsKLE4

Summation - Mr. Santoro

1 that, at that point, there were no other lending opportunities  
2 available to Eber Wine & Liquor or Eber-Metro.

3 THE COURT: Says who?

4 MR. SANTORO: Says the testimony in this case.

5 THE COURT: Who?

6 MR. SANTORO: Lester Eber.

7 THE COURT: Yes.

8 MR. SANTORO: And Wendy Eber.

9 THE COURT: Both interested. Why should I believe  
10 either one of them?

11 MR. SANTORO: I don't think the fact that --

12 THE COURT: He says there were no other opportunities  
13 in order to justify his authorizing a 12 and a half percent  
14 loan to himself. Duh.

15 MR. SANTORO: That is a permissible interest, your  
16 Honor, if you afford no credibility to Lester Eber's testimony  
17 and Wendy Eber's testimony because they are parties and  
18 interested. That is a permissible inference that the court can  
19 make.

20 I would submit that under these circumstances, during  
21 this time period, with the liabilities that were piling up at  
22 the Eber-Metro level and the Eber Wine & Liquor level, when the  
23 company is no longer operating as a Wine & Liquor distributor  
24 other than in a liquidation and winding-up mode, that there  
25 really isn't a bona fide opportunity --



L9MsKLE4

Summation - Mr. Santoro

1 THE COURT: And Lester raking off some millions of  
2 dollars that Southern had in its account to pay for this  
3 company to put in his own checking account as "consulting  
4 fees."

5 MR. SANTORO: I can talk about the consulting  
6 agreement, if you wish, your Honor.

7 I think we have had testimony, again -- now, you might  
8 look at Lester's testimony with respect to his consulting  
9 agreement with a jaundiced eye and afford it the credibility  
10 that you think it ought to be given. But we have Lee Hager,  
11 who testified -- this is one of the principals of Southern Wine  
12 & Spirits -- and he testified unequivocally that this was not  
13 an opportunity available to either Eber Wine & Liquor or  
14 Eber-Metro.

15 MR. BROOK: Objection. Mischaracterizes the testimony  
16 with unequivocally.

17 THE COURT: Look, I read his testimony.

18 MR. BROOK: I apologize.

19 THE COURT: I know how deals sometimes get done.

20 MR. SANTORO: So, your Honor, addressing the interest  
21 rate attached to the loans, which is, I think, the genesis of  
22 this conversation, there was testimony in our expert's report  
23 as to the reasonableness of that interest rate under these  
24 circumstances, and it was not rebutted in any way, shape, or  
25 form.

L9MsKLE4

Summation - Mr. Santoro

1 THE COURT: Which expert was that?

2 MR. SANTORO: Frank Torchio.

3 THE COURT: And was it a basis of his opinion on that  
4 point? I don't remember.

5 Was it not the premise that there was no other  
6 potential lenders?

7 MR. SANTORO: Your Honor, I don't have it in front of  
8 me, but I would submit that on the record that we have in front  
9 of us, there was no other potential lender under these  
10 circumstances.

11 THE COURT: I asked you a simple question.

12 MR. SANTORO: I don't know, your Honor.

13 THE COURT: Did you guys hire him, the defense, to go  
14 out and do an evaluation of what credit would have been  
15 available to this company at the time given the circumstances?

16 MR. SANTORO: That was not the assignment that was  
17 given to Mr. Torchio.

18 THE COURT: Right.

19 So he didn't offer an opinion on the relationship  
20 between the interest rates and any credit that might have been  
21 available or on the availability of other credit. What he did,  
22 I assume, is that defense counsel told him to assume there was  
23 no other potential lender and that the interest rate was 12 and  
24 a half percent because it was the only game in town.

25 Isn't that right?

L9MsKLE4

Summation - Mr. Santoro

1 MR. SANTORO: As to your assumption, I'm not sure,  
2 your Honor. As to what is actually in his report --

3 THE COURT: Well, I'm not sure either, to tell you the  
4 truth, but I didn't hear anything from the witness stand about  
5 that. And if it is in the report, it ought to be an easy  
6 matter for you to bring my attention to it. I mean, you're  
7 trying the case, not me.

8 MR. SANTORO: Your Honor, Mr. Mulry just asked me to  
9 refer to paragraph 54 of Mr. Torchio's report.

10 We will certainly follow up on this issue. I think  
11 one of the important facts here is that during this time  
12 period --

13 THE COURT: Well, he is offering an opinion, you're  
14 right about that. I appreciate you calling my attention to it.

15 MR. SANTORO: Thank my partner.

16 THE COURT: But wait.

17 And he says because there was significant liabilities  
18 and they had only Eber-Connecticut and Eber-Connecticut was  
19 losing money and it had no value.

20 Well, you know, you make the right assumptions, you  
21 get the right conclusions.

22 MR. SANTORO: Well, if you look at Eber-Connecticut,  
23 it had lost money by 2012 for six or seven years straight in  
24 the aggregate sum of \$7 million. The only credit that was  
25 available to Eber-Connecticut was a loan from Canandaigua

L9MsKLE4

Summation - Mr. Santoro

1 National Bank that would not be extended unless Lester  
2 guaranteed the note and put up collateral, deposited money into  
3 Canandaigua National Bank, and cash and marketable securities.

4 We have a company that has, as a 15 percent member, a  
5 competitor in Connecticut that has the ability to prevent and,  
6 in fact, did prevent Eber-Connecticut from borrowing over a  
7 certain amount of money during this time period. So the only  
8 financing ability would be at the Eber-Connecticut level, and  
9 efforts were made, and the only way to get financing at all was  
10 on Lester's credit, and a competitor was preventing any efforts  
11 beyond that.

12 So I think the availability of credit to Eber Wine &  
13 Liquor and Eber-Metro and Eber-Connecticut --

14 THE COURT: They didn't object to Lester extending the  
15 credit, right?

16 MR. SANTORO: Who didn't?

17 THE COURT: Eder-Goodman. That's the credit, or you  
18 said could block them from getting more credit above a certain  
19 amount.

20 MR. SANTORO: Lester extended the credit to Eber Wine  
21 & Liquor and Eber-Metro. Their power to cap the indebtedness  
22 was at the Eber-Connecticut level.

23 THE COURT: So that didn't affect Eber Wine & Liquor  
24 or Eber-Metro, right?

25 MR. SANTORO: I'm sorry. I'm not following, your

L9MsKLE4

Summation - Mr. Santoro

1 Honor.

2 THE COURT: You seem to me to be arguing both ways.  
3 You seem to me -- and correct me if I'm wrong -- to be arguing  
4 that one of the reasons there was no other credit available was  
5 because there was a 15 percent shareholder who had the ability  
6 to block additional indebtedness beyond a certain amount,  
7 right?

8 You just argued that.

9 MR. SANTORO: There are for two different companies,  
10 right.

11 THE COURT: Just stay with me. The company as to  
12 which that was true was Eber-Connecticut, right?

13 MR. SANTORO: Correct.

14 THE COURT: Now, that didn't affect the ability of  
15 Eber Wine & Liquor to borrow money, did it?

16 MR. SANTORO: No, it did not.

17 THE COURT: OK. That's all.

18 MR. SANTORO: It certainly affected the value of  
19 Eber-Connecticut, which was the only asset of Eber-Metro, which  
20 was the only asset of Eber Wine & Liquor at that time.

21 THE COURT: OK. Let's go on.

22 MR. SANTORO: In any event, the exhibit there  
23 aggregates the principal payments and it calculates interest at  
24 12 and a half percent. We have the underlying documentation  
25 there, and we think it is accurate. So if you added up the

L9MsKLE4

Summation - Mr. Santoro

1 interest and principal, it would be in excess of \$2 million.

2 Then we have the promissory notes, the other  
3 indebtedness from Eber Wine & Liquor and Eber-Metro to Lester  
4 Eber. Those were the notes in the amount of roughly  
5 \$1.5 million, and roughly half a million dollars, with a  
6 9 percent interest rate.

7 Notwithstanding the suggestions that had been made  
8 here, these promissory notes, the Wells Fargo -- and this is in  
9 the audited fact statement for Eber Wine & Liquor -- the Wells  
10 Fargo credit facility in 2006 was taken out in March of 2006.

11 THE COURT: Taken out meaning?

12 MR. SANTORO: It was opened. I'm sorry.

13 THE COURT: Yes.

14 MR. SANTORO: I'm not a transactional lawyer, your  
15 Honor.

16 So naturally those loans would be required as part of  
17 that transaction to be documented as junior to the Wells Fargo  
18 line of credit. I think that that, it's a permissible  
19 inference for your Honor to make to infer that, yes. These  
20 notes were executed and made at the time of that --

21 THE COURT: When you say "these notes," you mean what?

22 MR. SANTORO: The promissory notes. Each of the  
23 promissory notes from March 2006, the amended and restated  
24 promissory notes.

25 THE COURT: Is there any evidence at all that Wells

L9MsKLE4

Summation - Mr. Santoro

1 Fargo knew of their existence?

2 MR. SANTORO: The financial statements reflect the  
3 existence of the indebtedness, and I believe that is something  
4 that Wells Fargo would have been interested in at the time that  
5 the credit facility was opened.

6 THE COURT: You would think so.

7 MR. SANTORO: So that's what I believe substantiates  
8 the existence of these loans as bona fide indebtedness.

9 THE COURT: How about -- well, go ahead.

10 MR. SANTORO: So, again, this is our demonstrative  
11 Exhibit 5 Ks. If we can go to the promissory notes.

12 The second page, Samantha, I believe it is.

13 We reference the promissory notes and the general  
14 ledger, which reflect -- they do reflect, as Mr. Brook  
15 indicates, the note receivable from the officer, which is  
16 Lester Eber, and that is backed out. And we have the  
17 indebtedness, the total principal and interest as of the date  
18 of the foreclosure -- if you can just scroll down a little,  
19 Samantha, I want to make sure I'm not -- as being just about  
20 \$2 million, a little north of \$2 million.

21 So we have indebtedness to Lester Eber on the part of  
22 Eber Wine & Liquor and Eber-Metro as of the date of foreclosure  
23 in an amount in excess of \$4 million. I think that the record  
24 demonstrates that, with respect to the line of credit, I don't  
25 think there is any question as to the payments. With respect

L9MsKLE4

Summation - Mr. Santoro

1 to the promissory notes, I think we have established our burden  
2 that this is a legitimate and bona fide debt to Lester Eber.

3 So we have Lester Eber's side of the scale, which is  
4 roughly \$4 million, a little north of \$4 million. Then we have  
5 the other side of the scale, which is the value of Eber-Metro,  
6 OK. There is a lot of references to the company, what the  
7 company was worth, but we're valuing Eber-Metro here, for these  
8 purposes, because that is what Lester received in the  
9 foreclosure, the interest in Eber-Metro. Alexbay received  
10 Eber-Metro.

11 And we have the experts' reports which provide their  
12 methodology and their opinion as to value based on assumptions,  
13 and those speak for themselves. I think it is important here,  
14 for closing, to talk about the facts as they existed at that  
15 time because those are the assumptions that are being given to  
16 the experts. And I think the record reflects that at the time  
17 of the 2012 foreclosure, Eber Wine & Liquor's only real asset  
18 was its interest in Eber-Metro, and Eber-Metro's only real  
19 asset was its interest in Eber-Connecticut.

20 Eber-Connecticut, as I just indicated, for six years,  
21 it had not performed. It had lost \$7 million. Eber-  
22 Connecticut had no access to financing without Lester's  
23 guarantee. Eber-Connecticut was hamstrung by its competitor,  
24 who was its partner. Documents and testimony, e-mails and  
25 testimony, testimony from Robert Lowenthal indicate that



L9MsKLE4

Summation - Mr. Santoro

1 Canandaigua National Bank, CNB, hated this loan. It was doing  
2 everything it could to get out of this loan and to try to get  
3 Eber-Connecticut to go get an asset-based loan so that they  
4 wouldn't have to continue to incur the risk on this loan. He  
5 called it a challenged loan in his deposition testimony.  
6 That's on page 34 to 35. He explicitly testified that they  
7 wanted out of this loan.

8 And Lester confirms this in his transcript as well,  
9 day two of his testimony at pages 439 and 440, Lester was asked  
10 in a question: So foreclosure by CNB is a bad thing and  
11 foreclosure by Lester is a good thing, right?

12 That was the choice he was given. The reality is,  
13 Eber-Connecticut cannot exist at that point but for Lester  
14 Eber. If Lester doesn't loan the money to pay the legacy  
15 liabilities of Eber Wine & Liquor and Eber-Metro, those  
16 companies are out of business. And it is their assets, which  
17 are Eber-Connecticut, are going to be liquidated.

18 During that time period --

19 THE COURT: Tell me the year again.

20 MR. SANTORO: The year is from the end of Eber Wine &  
21 Liquor and Eber-Metro through the date of the foreclosure. We  
22 have Eber-Connecticut being dualled by its largest supplier, its  
23 revenues dropped off a cliff as a result of that,  
24 notwithstanding the franchise protection laws that exist in  
25 Connecticut.

L9MsKLE4

Summation - Mr. Santoro

1 Even when we have that Polebridge Bowman transaction,  
2 where six percent of Eber-Connecticut is sold to Polebridge  
3 Bowman for the note, for the \$350,000 note, Eder-Goodman signs  
4 on and declines to exercise its right of first refusal. If  
5 Eder-Goodman wanted that company so badly, it would have  
6 exercised its right of first refusal on those shares. It  
7 wasn't worth it to them.

8 Andy Eder testified.

9 THE COURT: Did you ask Mr. Eder why he didn't?

10 MR. SANTORO: We didn't, your Honor, but it's evident.  
11 It is evident and implicit from his testimony. I mean, he did  
12 testify --

13 THE COURT: When you say it is explicit from his  
14 testimony, then tell me why.

15 MR. SANTORO: He testified that he would not have  
16 bought the 15 percent without the liquidation preference, and  
17 the other side of that liquidation preference is the ability to  
18 cap the debt. He was protecting himself in that transaction  
19 when he bought the 15 percent from Southern Wine & Spirits.  
20 That is what was going on there.

21 He had the liquidation preference. I'll get my four  
22 and a half million dollars back if this thing collapses, but I  
23 don't want Southern in my market. Because I know exactly what  
24 happened here to Wendy Eber, the loss of the largest supplier  
25 could happen here to me if Southern comes into my market.

L9MsKLE4

Summation - Mr. Santoro

1           His lack of -- Andy Eder's lack of sensitivity and  
2           apparent lack of concern about Southern entering the market,  
3           I mean, it should be measured against the fact that, you know,  
4           in his words, he did zero due diligence and accepted a  
5           take-it-or-leave-it offer from Pat Dalton, who was Eber-Metro's  
6           attorney at the time.

7           They paid an enormous premium to keep Southern out of  
8           the market, protected their principal investment with a right  
9           of first refusal, a liquidation preference, and an ability to  
10          keep Eber-Connecticut from borrowing.

11          THE COURT: Mr. Eder testified that deals in this  
12          industry are frequently done on the basis of a multiple of  
13          revenues plus net assets, right?

14          MR. SANTORO: That's what he said, your Honor.

15          THE COURT: Is there any contrary evidence?

16          MR. SANTORO: The expert reports speak to that.

17          THE COURT: Is there any contrary evidence?

18          MR. SANTORO: I have not seen any contrary evidence  
19          here. But I will say that, just as we are measuring the  
20          credibility of parties who have an interest in the proceeding,  
21          I don't think for one minute that we should think that Andrew  
22          Eder doesn't have an interest in this proceeding. He is a  
23          competitor.

24          THE COURT: I understand that. Let's focus on what  
25          I'm asking. I have no reason to question that deals of this

L9MsKLE4

Summation - Mr. Santoro

1 sort are done frequently or often on the basis of a multiple of  
2 revenues plus net assets.

3 There is no evidence that this is an industry  
4 characterized by companies comparable to Eber-Connecticut that  
5 are publicly held, is that correct?

6 MR. SANTORO: Well, I think Mr. Torchio testified as  
7 to the methodology that he used, so I would think that is  
8 evidence here.

9 THE COURT: Yes. And what did he say on that?

10 MR. SANTORO: He testified today, your Honor.

11 THE COURT: Listen, counselor, I don't ask you  
12 questions to hear myself talk. You're the trial lawyer.

13 Do you remember any such evidence?

14 MR. SANTORO: No, your Honor.

15 THE COURT: OK. Now, in an industry characterized by  
16 privately held companies, don't you think that it's common  
17 knowledge that the profit and loss statements for such  
18 entities, if there are any, can be radically affected by all  
19 sorts of charges against income that maybe would not withstand  
20 an IRS audit or, for that matter, would not satisfy generally  
21 accepted accounting principles, don't you think?

22 Don't you think there are some such companies who have  
23 relatives on the payroll who do nothing?

24 Don't you think there are such companies where there  
25 are high-priced automobiles used by company personnel?

L9MsKLE4

Summation - Mr. Santoro

1 Don't you think you have some leases with entities  
2 that are owned by the people who own the business at rents that  
3 exceed, perhaps, fair market value for God knows what reason?

4 Don't you think that goes on?

5 I'm not talking about this company in particular.  
6 Don't you think that goes on?

7 MR. SANTORO: Yes, your Honor.

8 THE COURT: OK. And, therefore, to do acquisitions on  
9 the basis of purported income statements in companies like  
10 this, maybe it wouldn't make too much sense, agreed?

11 MR. SANTORO: In companies like this?

12 THE COURT: Companies like the sort I'm talking about  
13 hypothetically.

14 MR. SANTORO: In those companies, right.

15 THE COURT: Those companies.

16 MR. SANTORO: Yes. In those companies it might make  
17 sense to normalize some of those expenses.

18 THE COURT: It might.

19 And somebody with years of experience in the business  
20 might well feel that that person, if he is a buyer, has enough  
21 of a sense about what income is legitimately thrown off by a  
22 particular level of revenues to make a purchase offer that's  
23 satisfactory to that person without spending a lot of money on  
24 accountants and lawyers to try to normalize the sorts of things  
25 we're talking about?

L9MsKLE4

Summation - Mr. Santoro

1 MR. SANTORO: I don't know, your Honor. I really  
2 don't know. I can't answer that question for you. Maybe in  
3 concept, yes. Under those circumstances, yes.

4 THE COURT: OK. All right. Let's go on.

5 MR. SANTORO: So one thing Andy Eder was not talking  
6 about was taking on the liabilities of Eber-Metro, the company  
7 we're valuing. That balance sheet, his little charts that he  
8 gave us didn't contemplate what those liabilities were.

9 THE COURT: His little chart was something else  
10 altogether, but that's...

11 Go ahead.

12 MR. SANTORO: He didn't contemplate, and I think he  
13 testified that the liabilities were not of concern to him. He  
14 wasn't concerned about the PBGC liability, I think that is what  
15 he said.

16 So when we look at Eber-Metro, I don't think anyone  
17 here is arguing -- because I don't think you can argue -- that  
18 Eber-Metro at all times was in the controlled group for ERISA  
19 purposes, and that that termination liability would attach to  
20 Eber-Metro, if the pension plan was terminated, Eber-Metro was  
21 going to be responsible for that termination liability.

22 THE COURT: I'm afraid that we're running late and  
23 I've got another case in the hall. So wrap it up, if you can,  
24 in the next five minutes.

25 MR. SANTORO: In the next, I'm sorry, your Honor?

L9MsKLE4

Summation - Mr. Santoro

1 THE COURT: Next five minutes or so.

2 MR. SANTORO: That termination liability, as we heard  
3 from Mike Gallagher today, as of 2009, \$5,500,000, a little  
4 north of \$5,500,000. That's a real liability. That's a known  
5 and knowable liability that should be taken into account when  
6 valuing Eber-Metro as of the date of the valuation, just as the  
7 PBGC liability was known and knowable as of the date of the  
8 foreclosure.

9 The Teamsters liability was fixed. There was no  
10 getting around that liability or getting around the fact that  
11 Eber-Metro was in the controlled group and jointly and  
12 severally liable for that liability. The same goes with  
13 respect to the other liabilities that are backed out of the  
14 value in Mr. Torchio's report.

15 So if the court were to impose -- if the court were to  
16 find there was an unjust enrichment here with respect to that  
17 2012 foreclosure and were to impose an equitable remedy, we  
18 also submit that the court ought to take into account the  
19 payments that Lester made post foreclosure.

20 And for that, if we can go to pages, I think it is  
21 three and four or four and five of KKKK.

22 It is the demonstrative, Samantha. I'll try to get  
23 through this quick, your Honor.

24 So these are legal fees. This page is legal fees that  
25 Lester paid for with respect to dealing with the Teamsters in

L9MsKLE4

Summation - Mr. Santoro

1 the defined benefit plan. We are talking in a principal amount  
2 of \$337,576 over the period 2012 to 2016. And you see, your  
3 Honor, this is a demonstrative that's prepared based on the  
4 defendants' exhibits. The exhibit references there reference  
5 checks.

6 And I think in the interest of time -- there we go --  
7 I'll refrain from going through each of those checks, but they  
8 line up to those amounts. Now, we run interest on them, so if  
9 we were to impose an equitable remedy here, I think that there  
10 should be some consideration taken with respect to the time  
11 value of money.

12 Samantha, can we go to page five.

13 We have the same thing here. These are legal costs  
14 that Lester paid from the foreclosure through 2016, it looks  
15 like, yes, to these various law firms. I have referenced here  
16 the underlying documentation which is in evidence together with  
17 the Bates stamp numbers. We are talking at about a principal  
18 amount in the amount of \$492,530. We have interest rates here  
19 that attach to those, just to account for the time value of  
20 money.

21 In addition to these payments for legal fees, I think  
22 those were the ones you asked about the other day, Lester gave  
23 up his pension to settle with the PBGC. Lester came out of  
24 pocket to settle with Harris Beach. Lester came out of pocket  
25 to settle with the Teamsters with respect to the teamster



L9MsKLE4

Summation - Mr. Santoro

1 liabilities. We have those --

2 THE COURT: These points are easily covered in your  
3 papers.

4 MR. SANTORO: Yes, they are.

5 So finally, your Honor, I just heard it in closing  
6 arguments that the Monroe County surrogate court's order on the  
7 accounting has a preclusive effect in this litigation.

8 Now, it doesn't have a preclusive effect as to one  
9 issue and not the others. That accounting and the appraisal  
10 that was attached to it was a pleading under New York  
11 Surrogate's Court Procedure Act. The entire accounting and the  
12 entire appraisal. So under SCPA 302.

13 What is in that accounting are allegations, and it is  
14 an in rem proceeding, and all parties here were given notice  
15 that there was going to be an order or decree issued --

16 THE COURT: What's your point, counsel?

17 MR. SANTORO: My point is that the claims in this  
18 proceeding are embraced within that accounting. The accounting  
19 alleges that Eber Brothers has no value because it owns  
20 nothing. It annexes an appraisal to that effect, and that  
21 proceeding went forward.

22 You issued an order back in 2017 that said, in a  
23 footnote, it's not clear what Southern -- what CNB is going to  
24 do here, whether they are going to continue to press that  
25 proceeding, whether some of the parties are going to seek to

L9MsKLE4

Summation - Mr. Santoro

1 hold --

2 THE COURT: What is your point?

3 MR. SANTORO: It went forward, and it has a preclusive  
4 effect on these claims.

5 THE COURT: Really?

6 MR. SANTORO: Yes.

7 THE COURT: How?

8 And why am I hearing about it for the first time in  
9 closing argument?

10 Are you kidding me?

11 MR. SANTORO: Your Honor, we offered into evidence the  
12 plaintiffs are seeking a res judicata effect of that order, and  
13 you can't have res judicata for some of it and not for others.

14 THE COURT: I didn't hear that, actually. I don't  
15 think I heard that.

16 MR. SANTORO: It's in the record. I believe we'll see  
17 it. And we have --

18 THE COURT: I know the petition is in the record,  
19 Mr. Santoro. You have told me that several times in the last  
20 60 seconds.

21 Now, is there a claim that there is a preclusive  
22 effect?

23 (Continued on next page)

24

25

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1 MR. BROOK: There is not, your Honor.

2 THE COURT: No.

3 MR. BROOK: I was listing five different reasons why  
4 Lester could not take my client's shares, and I did say the  
5 word *res judicata* would bar it, too, but it's the fourth point  
6 down, and I will withdraw it anyway, so. . .

7 MR. SANTORO: Your Honor, we will brief this in our  
8 posttrial submissions. These claims are barred. We had two  
9 proceedings where these claims were embraced. One of them  
10 wrapped up. That's what I have to say on that.

11 THE COURT: Okay. So thank you both.

12 Can the plaintiff get me their papers -- their brief  
13 and any proposed findings and conclusions -- by October 6?

14 MR. BROOK: Certainly, your Honor. That's more than  
15 enough time.

16 THE COURT: All right. October 18 for the defendant.  
17 Any problem with that?

18 MR. MULRY: Yes, your Honor.

19 THE COURT: There is a problem with that?

20 MR. MULRY: No, your Honor. We will do that.

21 THE COURT: Reply by October 25.

22 MR. SANTORO: Your Honor, one thing. We did meet with  
23 Magistrate Parker.

24 THE COURT: So I gather.

25 MR. SANTORO: I'm sorry?

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1 THE COURT: You have been in touch with her chambers  
2 and you probably have a date.

3 MR. SANTORO: In early November.

4 THE COURT: Well, advise her of the schedule I have  
5 given you. And all I can tell you is, with or without  
6 Judge Parker, it is in everybody's interest to get this thing  
7 resolved before I do. Okay?

8 MR. BROOK: Your Honor, may I raise one thing?  
9 It's -- I can do it electronically but, after speaking with my  
10 clients, especially after this testimony, plaintiffs would like  
11 this Court to enter a preliminary injunction against any  
12 further transactions occurring, changing the bylaws, changing  
13 the equity of these companies, because otherwise I think at  
14 this point it should be not changed anymore until we get to a  
15 decision from this Court.

16 MR. MULRY: Your Honor, we were just handed this  
17 before the argument. We haven't --

18 THE COURT: What were you handed? I haven't seen  
19 anything.

20 MR. MULRY: We were handed just a proposed order  
21 granting preliminary injunction. We would like to review it  
22 and see if there are papers supporting this. We are happy to  
23 look at that and would want to respond.

24 (Pause)

25 THE COURT: Look, I'm not going to grant a preliminary

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1 injunction without notice, but my recollection is that you  
2 asked for something like this on an interim basis quite a long  
3 time ago, I mean, a couple of weeks, maybe months.

4 MR. BROOK: I don't believe --

5 THE COURT: Is it in the pretrial order?

6 MR. BROOK: There was -- the pretrial order includes a  
7 final proposed injunction, but not temporary restraining order.

8 THE COURT: Look, I understand the concern on the  
9 defendants' part, but it seems to me that a temporary  
10 restraining order of some kind is appropriate in light of what  
11 I have seen in this trial.

12 And what strikes me as perhaps being along the lines  
13 of what's reasonable is to enjoin all of the entity defendants  
14 and the estate from engaging in any transaction not in the  
15 ordinary course of business and to enjoin the estate and  
16 Ms. Eber from engaging in any of the sorts of transactions  
17 described in the second decretal paragraph of this proposed  
18 order, and to do that as a temporary restraining order  
19 effective immediately, and that will expire, unless extended,  
20 two weeks from now, to enable papers to be submitted.

21 Is there any reason why I shouldn't do that?

22 MR. BROOK: The only thing I would ask is to exclude  
23 Canandaigua National Bank because they are a nominal defendant.

24 THE COURT: Fair enough.

25 MR. SANTORO: Your Honor, I want to make sure I am

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1 clear that the second decretal paragraph, you are referring to  
2 the first full paragraph on page 2?

3 THE COURT: Yes, the one that has "ordered" in front  
4 of it and it is the second paragraph that says "ordered," which  
5 is why it is called the second decretal paragraph.

6 MR. BROOK: It may be the third. Is it the one with  
7 bullet points, your Honor?

8 THE COURT: No.

9 MR. BROOK: Okay.

10 MR. SANTORO: That's why. I'm sorry.

11 MR. BROOK: Yup.

12 MR. MULRY: Your Honor, since we are just receiving  
13 this, could we -- and we understand what the Court has said,  
14 could we have a few minutes to confer with our client, because  
15 our client has not seen this yet. Again, we were just handed  
16 this before the summation began.

17 THE COURT: Okay. Here is what we will do. As of  
18 right now -- I'm sorry. I didn't mean to refer to the second  
19 decretal paragraph. I misspoke.

20 As of right now, it is ordered that the Estate of  
21 Lester Eber and Wendy Eber are enjoined, for the next 14 days,  
22 unless this order is earlier terminated or dissolved, from  
23 selling, transferring, distributing, or otherwise disposing of  
24 any assets of, or belonging to, defendant Alexbay, LLC, or any  
25 nominal defendant, other than Canandaigua National Banking, or

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1 causing any other enjoined party to dispose of such assets,  
2 without prior written approval from the Court on notice to the  
3 plaintiffs; and it is further ordered that the entity  
4 defendants, other than Canandaigua National Bank, are enjoined,  
5 for the same period any transaction other than in the ordinary  
6 course of business, absent prior written approval of the Court  
7 on notice to the plaintiffs.

8 Now, I have to do a sentencing briefly. I will see  
9 you at 5:15 to hear anything further given what I have just  
10 said, and I think what I have said is adequate to dispose of  
11 this order, but I will hear any discussions from either side  
12 and --

13 MR. MULRY: Your Honor, if we just have a moment, I  
14 don't believe there is a need to come back, unless your Honor  
15 wants us to, if I can just have a moment.

16 THE COURT: I have enjoyed the pleasure of your  
17 company, but I can restrain myself.

18 It would have been helpful, sir, if you had given us a  
19 heads up earlier.

20 (Counsel confer)

21 MR. MULRY: I think we will have to come back.

22 THE COURT: So I will see you at -- wait a minute. At  
23 4:15 I will see you. I misspoke.

24 MR. MULRY: 4:15, your Honor?

25 THE COURT: I have 3:55, so at 4:15.

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MR. MULRY: All right. Thank you.

(Recess)

THE COURT: Okay, gentlemen and lady, where are we?

MR. SANTORO: Yes. So, your Honor, I am trying to just -- can we get a readback on it so I can understand some of the language that was in there?

THE COURT: Yes. I will help you right now.

"It is ordered that the Estate of Lester Eber and Wendy Eber are enjoined, for the next 14 days, unless this order is earlier terminated or dissolved, from selling, transferring, distributing, or otherwise disposing of any assets of, or belonging to, defendant Alexbay, LLC, or any nominal defendant, other than Canandaigua National Bank, or causing any other enjoined party to dispose of such assets, without the prior written approval from the Court on notice to the plaintiffs; and it is further ordered that the entity defendants, other than Canandaigua National Bank, are enjoined, for the same period and on the same terms, from engaging in any transaction other than in the ordinary course of business, absent prior written approval of the Court on notice to the plaintiffs."

(Counsel confer)

THE COURT: It does occur to me that this language I just read out doesn't enjoin transfer of shares.

MR. SANTORO: It enjoins transfer of assets.



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1 MR. BROOK: Assets.

2 THE COURT: But it ought, also, to cover, I think,  
3 transfer or encumbrance of shares, which I will fix in a  
4 minute. But that's the substance we have got so far, what I  
5 have read out. And then if it needs to be amplified, we will  
6 do that separately, not to confuse you.

7 MR. SANTORO: My concern, your Honor, with respect to  
8 the injunction with respect to the estate is that the estate  
9 is -- there is a very similar application that the plaintiffs  
10 have made in the Monroe County Surrogate's Court that's  
11 pending, and I am concerned about the administration of the  
12 estate in the ordinary course and how -- you know, that estate  
13 is under the jurisdiction of the Monroe County Surrogate's  
14 Court. I am just concerned that --

15 THE COURT: The estate is not an entity defendant.

16 MR. SANTORO: In the first part you enjoined the  
17 estate.

18 THE COURT: Yes, I did.

19 MR. SANTORO: Okay. And I think that's the same  
20 relief that's being sought in the Surrogate's Court, in sum and  
21 substance.

22 THE COURT: Look. This is 14 days, unless earlier  
23 terminated or dissolved, and I don't see a problem. I have  
24 done it first. The supremacy clause of the U.S. Constitution  
25 applies, and whatever it is, my writ is superior.

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1           Now let's deal first with the language that I have  
2 already dictated. Are there any other concerns on either side?

3           MR. BROOK: Your Honor, and this may -- I hope I am  
4 wrong, but just based upon sort of the reaction to what should  
5 be a nonsignificant issue here, considering how much testimony  
6 we heard about how the company is not for sale, I would ask  
7 that the second decretal paragraph also be added, which is to  
8 disclose any transactions that would have violated this order  
9 within seven days, just in case Ms. Eber wasn't being totally  
10 forthright yesterday during her testimony when I tried to  
11 ascertain what the current status of the companies is.

12           THE COURT: Is there any objection to that?

13           MR. SANTORO: Yes, your Honor.

14           THE COURT: Why?

15           MR. SANTORO: We object to that paragraph in the sense  
16 that it is now going to require that we provide an accounting  
17 to the plaintiffs in the short term, and we will almost  
18 certainly be back here because the sufficiency of the  
19 accounting will never be acceptable to the plaintiffs.

20           MR. BROOK: I disagree with that characterization for  
21 what it's worth. I think it is pretty simple, trying -- I'm  
22 sorry.

23           THE COURT: I am going to --

24           MR. SANTORO: The breadth of that decretal paragraph,  
25 any distribution.

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1 THE COURT: Way too broad. I understand the language  
2 is way too broad, because it would require them to report on  
3 every can of beer they sold or bottle of wine they sold. So  
4 I'm not going to do that. But I am going to urge you, both  
5 sides, to work out some acceptable substitute there, because I  
6 think it is appropriate to know what the business structure is  
7 at this point and who owns what. You know, I know what it was  
8 some time ago, but I don't know for sure today.

9 MR. BROOK: What if we excluded --

10 THE COURT: What if you and your colleagues work it  
11 out, and if you can't work it out, you can come back to me on  
12 an order to show cause?

13 MR. BROOK: Yes, your Honor.

14 THE COURT: Now, the other thing that occurred to me,  
15 as I indicated, to substitute is something to the general  
16 effect that neither the estate nor Ms. Eber nor any of the  
17 entity defendants, which includes nominal defendants, may sell,  
18 transfer, or encumber any shares or membership interests in any  
19 of the other entity defendants.

20 MR. BROOK: Excluding Canandaigua National Bank, your  
21 Honor.

22 THE COURT: Yes, of course.

23 Any problem with that? Defense?

24 MR. SANTORO: We don't have a specific problem with  
25 that, your Honor. Your Honor's ruling on the application we

L9m2Kle5

1 will accept.

2 THE COURT: Okay. So in addition to the two  
3 paragraphs that I dictated slightly earlier, my present order  
4 is supplemented by adding that neither the Estate of Lester  
5 Eber or Ms. Wendy Eber, nor any of the entity defendants,  
6 including nominal defendants, shall transfer, sell, or encumber  
7 any shares or membership interests in any of the other entity  
8 defendants for the same 14-day period, provided, however, that  
9 this paragraph does not apply to Canandaigua National Bank.

10 Satisfactory?

11 MR. BROOK: Yes, your Honor.

12 THE COURT: Satisfactory, Mr. Santoro, Mr. Mulry?

13 MR. MULRY: Yes. Understood, your Honor.

14 THE COURT: Now, look. This was done quickly, but not  
15 thoughtlessly. If there is some legitimate need that some  
16 modification be made, you can apply to me. I am available and  
17 reachable on papers. And if we are running into the 14-day  
18 period, I mean, obviously the plaintiffs are going to have to  
19 make a motion. I am just freezing the status quo for now, but  
20 the plaintiff will have to make a motion in order to extend  
21 this unless you can work something out, which would of course  
22 be very desirable. My only concern here is to freeze the  
23 status quo so that we know what the shape of the table that I  
24 am dealing with is and that it is not going to change.

25 MR. BROOK: Your Honor, I will file a formal motion

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1 for a preliminary injunction. I will fix that second paragraph  
2 certainly. I was wondering if could we get a briefing schedule  
3 now because --

4 THE COURT: I gave you one.

5 MR. BROOK: For the preliminary injunction.

6 THE COURT: No.

7 MR. BROOK: So if I file that by Friday this week, I  
8 just want --

9 THE COURT: You will do it by an order to show cause,  
10 and there will be a schedule in the order to show cause.

11 MR. MULRY: Judge, certainly we will speak with  
12 Mr. Brook to see if the parties can engage in a stipulated  
13 order that we can present to you that will address the concerns  
14 you have raised, and we will try to work with Mr. Brook on  
15 that.

16 THE COURT: No, I appreciate that. And, you know, you  
17 are all good lawyers and you ought to be able to work this out.  
18 This ought to be in a standstill mode until you either settle  
19 it or get a decision. That's the only sensible thing that I  
20 can see. It wouldn't make any sense to wake up to find out,  
21 you know, that Eber-Connecticut's been sold to the Emirates or  
22 something. Maybe that would be a good thing. Who knows?  
23 Okay. But I don't think they do alcohol, right?

24 Okay. Thanks, folks.

25 MR. BROOK: Thank you, your Honor.

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1 MR. MULRY: Thank you, your Honor.

2 THE COURT: Stay healthy, everybody.

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